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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 779

CITY OF JACKSON, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF MISSISSIPPI; WALTER A. SCOTT, MAYOR; A. F. HAWKINS AND R. M. TAYLOR, COMMISSIONERS THEREOF,

Petitioners,

vs.

MISSISSIPPI POWER & LIGHT COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. MORGAN STEVENS,
W. E. MORSE,
Counsel for Petitioners.

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Petition.

The City of Jackson, a municipal corporation under the laws of the State of Mississippi; Walter A. Scott, Mayor thereof; A. F. Hawkins and R. M. Taylor, Commissioners thereof, all resident citizens of Jackson, County of Hinds, State of Mississippi, pray that a writ of of certiorari issue to review the judgment of the Circuit Court of Appeals

for the Fifth Circuit, entered January 17th, 1941, reversing the judgment of the District Court for the Jackson Division of the Southern District of Mississippi dismissing for want of jurisdiction the petition of Mississippi Power & Light Company, respondent herein, "for a Declaratory Judgment and ancillary relief" filed as Civil Action No. 181 on the docket of said District Court (Cause No. 9584, C. C. A.).

The judgment of the District Court, omitting caption, reads:

> "This cause came on to be heard upon the petition of plaintiff for a Declaratory Judgment and the motion of the defendant to dismiss, and the Court having considered same and being now advised in the premises and being of the opinion that this Court has no jurisdiction of this cause, it is, therefore, considered by the Court that the petition filed by the plaintiff be and the same is hereby dismissed for lack of jurisdiction and the plaintiff taxed with the costs.
>
> "So ordered on this the 18th day of June, 1940.
>
> "S. C. MIZE,
> United States District Court." (Tr. 91).

The judgment of the Circuit Court of Appeals, omitting caption, is as follows:

> "This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel;
>
> "On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;
>
> "It is further ordered and adjudged that the appellees, City of Jackson, and others, be condemned, in solido, to pay the costs of this cause in this Court."

Petitioners make this application for a writ of certiorari on the question whether the Federal District Court has jurisdiction of a petition for a Declaratory Judgment alleging that respondent as plaintiff had a contract franchise with the City of Jackson to furnish gas from a natural gas field located at Jackson, Mississippi, at rates fixed therein, with an optional provision to seek gas elsewhere when the Jackson field became insufficient and furnish it on adequate rates to be determined and fixed; that the plaintiff had fully complied with the contract; that the Jackson gas field is presently insufficient for the performance of the contract; that plaintiff has sought, obtained and is furnishing pipeline gas from foreign fields at rates initiated by it but not approved by the City as the rate-making power; that the City claims that the Jackson field is still sufficient, with a prayer for a declaration of rights, and particularly that "(a) Under said contract plaintiff has a right, as at now, and from February 7, 1940, to furnish in said City pipeline gas, and that the rates prescribed by Section 3 of the contract do not apply thereto; (b) That under said contract, plaintiff has the right, if the Court be of opinion that said plaintiff may not so furnish pipeline gas, to discontinue furnishing said City and its inhabitants pipeline gas and to leave the said City solely dependent upon that portion of the gas originating from said Jackson field that plaintiff may supply, and for such other, further, and general relief as in equity and good conscience may seem meet" (Tr. 17). There is presented the question whether under the Johnson Act (Judicial Code, Section 24, amended; 28 U. S. C. A. 41 (1) 481 at Large 775, Chap. 283) the Federal District Court has jurisdiction on a petition "for a Declaratory Judgment and ancillary relief," (Tr. 3) to review a contract franchise granted by the City of Jackson to respondent to furnish natural gas to the inhabitants of the City of Jackson and its industries on rates therein

approved "so long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of 40 miles thereof in the State of Mississippi sufficient to supply the City of Jackson and its inhabitants and its industries"; and establishing "rates and charges for natural gas service in Jackson for gas taken from the natural gas field or from a commercial gas field within a radius of 40 miles of Jackson, Mississippi," and providing "Should Jackson gas field or all the gas fields in the State of Mississippi within a radius of 40 miles of said City become insufficient for the performance of that hereunder required of the grantee, it may thereafter, and not before, obtain natural gas from other fields and rates therefor shall be fixed hereunder that are just and reasonable," and providing that this provision is purely optional with the grantee, imposing no obligation to maintain its equipment for manufacturing gas or to contract for gas from any foreign field, and providing also that grantee might under the option supply artificial gas or a mixture of artificial and natural gas and that just and reasonable rates should be fixed therefor; and to determine the factual issue whether the Jackson gas field is or is not sufficient when the Court concededly under the Johnson Act has no jurisdiction to suspend or enjoin the rates fixed in the contract franchise or the new rates initiated by respondent on its assumption that the gas field is insufficient.

There is presented concretely the question whether, conceding that the Federal District Court has no jurisdiction under the Johnson Act to suspend or enjoin rates, nevertheless a utility company bound by its contract franchise to furnish gas for 25 years or so long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of 40 miles thereof sufficient to supply the demand, is at liberty to initiate higher rates for pipeline gas on the assumption that the Jackson field is in-

sufficient and after raising the gas rates petition for a declaration of rights, the necessary effect of which would be to suspend the rates fixed by the contract franchise and to sustain the rates promulgated by the company, especially when the same issue has been presented in a suit filed by petitioners as complainants against respondent in the Chancery Court of Hinds County, Mississippi, was removed to the Federal District Court and remanded by said Federal District Court, and is now pending in a State court of competent jurisdiction on issues which necessarily embrace the factual issue whether the Jackson gas field is sufficient or insufficient and whether or not the higher rates initiated by respondent under its assumption that the gas supply was insufficient should stand. May the Federal District Court, concededly having no jurisdiction to suspend or enjoin rates, determine a purely controverted issue of fact without giving other or further relief?

Statement.

Plaintiff, a Florida corporation, invoked the Declaratory Judgment Act upon the grounds (a) diverse citizenship, (b) rights alleged to arise under the Constitution, with the amount in controversy in excess of $3,000.00 (Tr. 3). It submitted and relied upon the contract franchise executed October 20, 1930, wherein respondent "is hereby granted on the terms and conditions hereinafter contained * * * the franchise right and privilege to operate gas works for natural gas * * * to be used in furnishing or supplying said municipality * * * with natural gas for fuel, power, light or any other lawful purpose." The franchise is for 25 years conditioned on the plaintiff furnishing gas to the City of Jackson and its inhabitants "so long as commercial natural gas is produced in commercial quantities in the City of Jackson * * * sufficient to supply the demands of the City of Jackson and its inhabitants and its industries."

Section 3 of the contract franchise establishes the rates and charges for natural gas. Section 5 provides that should the Jackson gas field become insufficient the grantee might thereafter, and not before, obtain natural gas from other fields "and rates therefor shall be fixed hereunder that are just and reasonable." The petition averred that when the contract was made more gas was produced than could be distributed or consumed locally and that certain pipe lines were constructed to

(a) Mobile, Pensacola, Bogalusa and the Mississippi Coast;

(b) Magnolia;

(c) Hattiesburg;

(d) Canton;

(e) Clinton (Tr. 8).

And in presenting its cause to the Circuit Court of Appeals, respondent stated "plaintiff does not own gas wells, has no contract relation with such owners other than as averred and the remaining gas 'is not available' and renders the supply at Jackson insufficient," thereby conceding that more gas is produced in the Jackson field than is distributed by respondent locally, but respondent averred that "there was not and is not presently, as at February 7, 1940, or at any time since, nor will there be from said Jackson gas field at any time in the future * * * natural gas in commercial quantities sufficient in the Jackson gas field to meet Jackson requirements under said Section 3" (Tr. 14). The petition further alleged that Love Petroleum Company was under contract to respondent to furnish 40 per cent. of the gas needed by the City, a contract with the Jackson Oil and Gas Company for 10 per cent. supply and a contract with the United Gas Pipeline Com-

pany to supply 50 per cent., "but thereasto plaintiff had no contract right so as to make said United supply all gas by it produced in the Jackson field. The United was obligated to other communities and performed its obligation in accordance with the legal import thereof;" that other gas wells were owned or controlled by the Willmut Gas & Oil Company for use in its pipeline; by the City of Canton for use in its pipeline, and by certain other individuals. Respondent had anticipated the needs of Jackson and planned therefor, and being advised by the United, a company engaged in the transportation and distribution of gas from the Louisiana and Texas fields, that the available gas at Jackson was rapidly being depleted, had proceeded to contract for pipeline gas from United; that the contract franchise "does not fix the rate whereat said pipeline gas is to be sold in Jackson;" that respondent "filed with the City a gas rate for the service rendered as to all gas which plaintiff is compelled to furnish from said pipeline;" (Tr. 16) and that "for such pipeline gas so thus consumed by said City of Jackson and its inhabitants, plaintiff is entitled under said contract to have this right established and adjusted, and the right thus to do is that whereasto a declaration by this Honorable Court is requisite" (Tr. 15).

Shortly after the filing of this petition for a Declaratory Judgment, petitioners exhibited their bill of complaint in the State court of Hinds County, Mississippi, to enjoin respondent from demanding, charging or collecting the higher rates for so-called pipeline gas. A petition to remove the case to the Federal District Court was filed and overruled, whereupon respondent sought and obtained a restraining order from Honorable S. C. Mize, Federal District Judge, and filed the record with the Federal District Court. A motion to remand was presented, argued and sustained. Said cause was remanded before the motion to dismiss the

petition for a Declaratory Judgment was submitted, although said motion was then pending. Petitioners presented their motion to dismiss upon the following grounds:

"1. Because this Court has no jurisdiction of the subject matter.

"2. Because the complaint is insufficient as a matter of law to state a cause of action against these defendants.

"3. Because the plaintiff has a plain, speedy, and efficient remedy at law, or in equity, in the Courts of Mississippi.

"4. Because the complaint shows on its face that the plaintiff was awarded a franchise contract for twenty-five years, conditioned on the plaintiff furnishing gas to the City of Jackson and the inhabitants thereof on the schedule of rates therein provided as long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of forty miles thereof in the State of Mississippi, sufficient to supply the demands of the City of Jackson and its inhabitants and its industries, and the complaint shows on its face that commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of forty miles thereof in the State of Mississippi sufficient to supply the said demands, it affirmatively appearing from the bill of complaint and exhibits that the total amount of commercial natural gas produced in commercial quantities in the City of Jackson and in a radius of forty miles thereof is more than ample to supply the demands of the City of Jackson and its inhabitants and its industries, and that the plaintiff has failed, neglected and refused to control the said demand, although it obligated itself to do so in the contract franchise.

"5. Because the Federal District Court under the Johnson Act (U. S. C. A. Title 28, Sec. 41 Subd. (1) (1)) has no jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State or any rate-making body of any political sub-

division thereof, or to enjoin, suspend, or restrain any action in compliance with any such order in all cases where such order affects rates chargeable by a public utility, and had been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the Courts of such State, and because the complaint shows on its face that a franchise contract was awarded to the plaintiff, after notice and hearing, and has been in force and effect since October 20, 1930, and because the plaintiff is here attempting to do indirectly, through the medium of a declaratory judgment, what the plaintiff could not do directly; the Declaratory Judgment Act is not jurisdictional but procedural only, and this Honorable Court has no authority to apply or enforce, and the plaintiff has no right to invoke a remedy in the cause over which the Court has no jurisdiction. If the Court should grant the relief prayed for, the plaintiff would be entitled to an injunction based thereon in violation of the letter and spirit of the Johnson Act.

"6. Because the complaint shows upon its face that the plaintiff has now attempted to promulgate and put into force and effect a new rate—one not based on the contract Exhibit "A"—and has attempted to base said rate upon the alleged cost of pipeline gas or gas which the plaintiff says it is now obtaining from the United Gas Pipeline Company; and plaintiff is erroneously attempting to have this Honorable Court assume the jurisdiction of rate-making when the complaint reflects on its face that no new rate has thus far been fixed by the City of Jackson, as a rate-making authority, or agreed upon by the parties, and that the new rate promulgated by the plaintiff has not been approved or agreed upon and is without authority of law, and that the plaintiff has not exhausted its remedy to have an alteration of the contract rate, reflected by Exhibit "A", or to fix any new rates that are just and reasonable."

No written opinion was filed by the learned District Judge, but the judgment of the Court dismissed the petition for

want of jurisdiction. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court as shown by its judgment, supra, and as reflected by the opinion rendered by Judges Foster, Hutcheson and McCord, Mr. Justice Hutcheson writing the opinion of the Court, which opinion is not yet reported.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the learned District Court had jurisdiction.

2. The opinion, among other things, recites "The allegations of the complaint, that plaintiff has been compelled to institute and put in effect, reasonable rates for the pipeline gas it is furnishing, aside, every allegation has to do with and is directed to the single question of a determination and declaration as to whether the Jackson field is insufficient and if it is, as to the rights of the parties under the changed conditions. The allegations as to rates instituted by the plaintiff are not necessary to the tendered issue," etc. This assumes that the Court should ignore the vital averment that respondent has initiated higher rates and the manifest purpose to have the Federal Court approve its action in so doing and therefore to have the Federal District Court do indirectly what it could not do directly.

3. In necessarily holding that the Federal District Court should take jurisdiction of a purely fact issue in a case where it does not have the jurisdiction and therefore the power to enforce its judgment without expressly violating the provisions of the Johnson Act.

4. In reducing the Federal District Court to a mere commissioner or fact finding agency and to leave to some other court in some other case the enforcement of its finding.

5. The federal court has no jurisdiction to determine a fact issue without at the same time applying the law to the facts so determined and entering a final decree disposing of all issues presented by the pleadings in the given cause.

6. In failing to recognize that any decree adjudging the Jackson gas field insufficient would automatically suspend the rates agreed upon and approved in the contract franchise.

7. The Court is in error in overlooking or ignoring the general statement of the petition of respondent that "There is need for a Declaratory Judgment and ancillary relief" (Tr. 3); the averment that respondent had "filed with the City a gas rate for the service rendered as to all gas which plaintiff is compelled to purchase from said pipeline" (Tr. 16); the averment "for such pipeline gas so thus consumed by said City of Jackson and its inhabitants, plaintiff is entitled under said contract to have this right established and adjusted, and the right thus to do is that whereasto a declaration by this Honorable Court is requisite," (Tr. 15) and in putting aside the general prayer "for such other, further and general relief as in equity and good conscience may seem meet"; therefore overlooking the fundamental aim and purpose of the petition of respondent, to-wit, justification to suspend the old rate and substitute a new and higher rate.

8. The opinion and judgment of the Court is contrary to the holding of the Federal District Court in prior litigation between the Mississippi Power & Light Company, respondent herein, and the City of Jackson (9 Fed. Supp. 564); the principles announced by the special statutory three-judge court in *Sears, Roebuck & Company* v. *Roddewig*, 24 Fed. Supp. 321; the principles announced by the Circuit Court of Appeals for the Third Circuit in *Wm. B. Scaife & Sons Company* v. *Driscoll, Collector of Internal Revenue* (C. C. A. 3rd), 94 Fed. 2d 664; the pronouncements

of the Circuit Court of Appeals for the 9th Circuit in *Southern Pacific Company* v. *McAdoo,* 82 F. 2d 121; the pronouncements of the Circuit Court of Appeals for the Seventh Circuit in *American Automobile Insurance Company* v. *Freundt,* 103 F. 2d 613, and the principles announced in *Aetna Casualty & Surety Company* v. *Quarles,* 92 F. 2d 321, and *U. S. F. & G.* v. *Koch,* 102 F. 2d 288; and also the holding of the Federal District Court in *Lake Erie Prov. Company* v. *Moore,* 11 Fed. Supp. 522, that "the declaration of a right without the right to make it effective would appear at first impression to be a vain proceeding. * * * Relief under the Declaratory Judgment statute only may be had where the court has jurisdiction (includes power) to grant it." And other like decisions to be noted in the brief.

9. The Circuit Court of Appeals did not refer to and presumably attach no significance to the admissions of learned counsel for respondent in their brief, filed with said Court (page 27), that the City of Jackson had filed a suit against respondent and quoting from the prayer of the bill in that case, thereby reflecting that the learned District Judge, after having reviewed the pleadings in that case on motion to remand prior to the entry of any judgment dismissing this cause for want of jurisdiction, had the discretion to require respondent to exhaust state remedies, especially when the very issue here presented as to the sufficiency or insufficiency of the Jackson gas field is necessarily and directly involved in said State court proceeding where the State court has jurisdiction of the subject matter and the parties.

Reasons for Granting the Petition.

1.

This case presents an important question of jurisdiction. If the cause is remanded and the learned District Judge

goes into the fact issue as to the sufficiency or insufficiency of the Jackson gas field, all parties will be involved in great cost, energy and expense. The Court will take judicial knowledge of the fact that the inquiry would necessarily involve geological formations, gas pressure, reasons why certain wells have quit producing, the probability of continued production in wells already drilled, the possibility of drilling additional wells, and all questions pertaining to available supply of gas in the Jackson gas field.

2.

If the opinion and judgment of the Circuit Court of Appeals is erroneous, petitioner would have the right of a subsequent appeal to the Circuit Court of Appeals with the ultimate right to have this Court finally determine the question of jurisdiction and if the Court has no jurisdiction then the abortive effort to try the fact issue as to the sufficiency or insufficiency of the Jackson gas field would settle nothing.

3.

It is believed, and our contentions will be, that respondent has here asked the Federal District Court to do indirectly that which could not be done directly, to-wit, exercise jurisdiction "to suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend or restrain any action in compliance with any such order where jurisdiction is based solely on the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order is one that affects rates chargeable by a public utility," etc. 28 U. S. C. A. as amended, Paragraph 41 (1, 1 a). "The Supreme Court has held that the Declaratory Judgment Act is not

jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction." (*American Automobile Insurance Company* v. *Freundt*, 103 F. 2d 613 (C. C. A. 7th). "The mere fact that a Declaratory Judgment is sought is not of itself a ground for Federal jurisdiction." (*Southern Pacific Company* v. *McAdoo* (C. C. A. 9th) 82 F. 2d 121.) This new remedy is a procedural statute and as has just been stated by this Honorable Court, headnote 6, *Sibbach* v. *Wilson & Company*, Law ed. Advance Opinions, 85 Law Ed. 349, No. 6, "Procedure is the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard and infraction of them." It is believed that the rights and duties here recognized by substantive law are withdrawn from Federal jurisdiction and that the purpose of Congress in delimiting the jurisdiction over rates also denies jurisdiction of any remedy to suspend rates or to justify a new and higher rate.

4.

Because the principles announced by the Circuit Court of Appeals conflict with the principles announced by the three-judge court in *Sears, Roebuck & Company* v. *Roddewig*, 24 Fed. Supp. 321, and *Wm. B. Scaife & Sons Company* v. *Driscoll, Internal Revenue Collector* (C. C. A. 3rd), 94 F. (2d) 664, and involving tax cases withdrawn from the jurisdiction as much so as rate cases. In the first tax case mentioned, the Court in part said "A suit to enjoin a tax and a suit to enjoin the use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other. If a Federal district court has jurisdiction to enjoin the imposition of the penalties provided in a State statute for failure on the part of a taxpayer or one whose duty it is to collect and remit taxes,

it has, as a practical matter, jurisdiction to prevent the collection of the taxes." In the second tax case mentioned, it was held that the Johnson Act "specifically excluded the question of Federal taxation from the operation of the Declaratory Judgment Act," but the appellant there unsuccessfully urged his right to compel the collector to accept and file an amended return, the Court saying "If the appellant can succeed in this purpose, the tax thus assessed will be smaller in amount than that which would be assessed on the basis of the first return. The suit at bar is in reality one to restrain the assessment and collection of a tax." The principles thus announced should rule the case at bar.

5.

It is believed, and it will be our contention, that the principles announced by the Circuit Court of Appeals in this case clash with those announced and applied in *U. S. F. & G. Company* v. *Koch*, 102 F. (2d) 288, that "The report of the Judiciary Committee of the Senate states that there is a discretion under the statute, 'not to issue the judgment if it will not finally settle the rights of the parties' "; a determination of the sufficiency or insufficiency of the Jackson Gas Field would probably relieve respondent from the obligation of continuing the old rate, but it would not settle the rights of the parties as to a proper reasonable rate for pipeline gas. That issue could only be determined by the Mayor and Commissioners of the City of Jackson constituting the rate-making body under the Mississippi Statutes.

6.

Because the opinion and judgment complained of would require the Federal District Court to take jurisdiction of a purely fact issue in a case where it does not have jurisdiction of the rights and duties recognized by substantive law, or the power to enforce its judgment without expressly

violating the provisions of the Johnson Act and in reducing the Federal District Court to a mere commissioner or fact-finding agency, leaving to some other court and some other case the enforcement of its findings.

7.

Because the Circuit Court of Appeals did not attach proper significance to the admissions of counsel for respondent in their brief that in a State court of competent jurisdiction respondent stands enjoined from demanding or enforcing higher rates and that the issue here involved is directly involved in said State court action; that the learned District Judge had the pleadings in that case before him on motion to remand and therefore had the discretion to require respondent to exhaust State remedies and that if the right result was reached in the District Court, the cause should have been affirmed instead of reversed.

8.

Because the Circuit Court of Appeals overlooked or ignored the averment in the petition of respondent that "there is need for a Declaratory Judgment and ancillary relief" (Tr. 3); the averments that the respondent had filed with the City new rates; that "the right thus to do is that whereas to a declaration by this Honorable Court is requisite" (Tr. 15); and the general prayer "for such other, further and general relief as in equity and good conscience may seem meet"; and the general aim and object of the petition to authorize the suspension of an old rate and the substitution of a new and higher gas rate.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

W. E. Morse,
Attorney for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The District Court delivered no written opinion. The opinion of the Circuit Court of Appeals is not yet reported, but will be found on page 101 of the record.

Jurisdiction.

Jurisdiction is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925; 43 Statutes at Large 938; United States Code Annotated, Title 28, Sec. 347.

Statement.

A statement of the petition for Declaratory Judgment and the motion to dismiss will be found in the petition, pages 5-10, *supra.*

Argument.

If certiorari is granted, we submit, with confidence, that we can demonstrate both upon reason and upon the authorities that the Federal District Court here has no jurisdiction, for the reasons following:

1. The petition reflects that respondent had itself decided the fact issue and concluded that the Jackson gas field is now insufficient and acting upon its own judgment contracted for pipeline gas and initiated and filed with the City of Jackson a schedule of rates two or three times higher than the schedule fixed by the Mayor and Commissioners of the City of Jackson as a rate-making body and approved and accepted by respondent and fully set forth in the contract franchise made Exhibit "A" to the original petition. The petition on its face declares "There is need for a Declaratory Judgment and ancillary relief" (Tr. 3);

that respondent had "filed with the City a gas rate for the service rendered as to all gas which plaintiff is compelled to purchase from said pipe line" (Tr. 16); that "for such pipeline gas so thus consumed by said City of Jackson and its inhabitants, plaintiff is entitled under said contract to have this right established and adjusted, and the right thus to do is that whereas to a declaration by this Honorable Court is requisite" (Tr. 15). The plaintiff has a prayer "for such other, further and general relief as in equity and good conscience may seem meet." Properly interpreted therefore, the petition not only prays for a proper declaration of rights, but for relief. Regardless of the prayer, the statute expressly provides "Further relief based on a Declaratory Judgment or decree may be granted whenever necessary or proper" 28 U. S. C. A. Para. 400 (2). The Circuit Court of Appeals, in its opinion, says "The allegations as to rates instituted by the plaintiff are not necessary to the tendered issue, no relief is asked as to them and they may and will be disregarded in the consideration and determination of the issue tendered for a declaration, whether the Jackson field is insufficient and if it is what are the rights of the parties." It is respectfully submitted that the Court has no right to ignore the allegations as to rates, the averment that ancillary relief is needed, and the prayer for general relief, and the manifest purpose and aim of the petition to be relieved from the rates fixed by the contract franchise, and therefore to suspend those rates altogether, and to be justified in the action of respondent in promulgating rates that are much higher, that have not been approved by the City of Jackson as a rate-making body, and that are, we submit, unauthorized and illegal. Respondent is here attempting to accomplish indirectly what cannot be done directly. It is axiomatic that an individual can not accomplish by indirection what is prohibited. The Johnson Act expressly provides that

"no District Court shall have jurisdiction of any suit to * * * suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State or any rate-making body, etc. * * * where such order affects rates chargeable by a public utility," etc. U. S. C. A. Title 28, Para. 41 (1). The old rate was fixed by ordinance and therefore is an order of a rate-making body. Its authority so to do is expressly conferred by the Legislature of Mississippi in Secs. 2393 and 2426, Mississippi Code of 1930 (see appendix). By statutory authority, the Mayor and Commissioners "have the power to enact ordinances for the purposes hereinafter named," including among others, the power "to prescribe by ordinance the maximum rates and charges for the supply of water, gas and electric energy or current for lights and power, or either, furnished by an individual, company or corporation to the municipality and its inhabitants or either, such rates and charges to be just and reasonable"; with the further provision that if the rates and charges be unreasonable they may be "reviewed and determined by the Chancery Court of the county, but the authority hereby granted shall not be construed so as to impair the effect or obligation of any valid or binding contract." In the exercise of that power, Sec. 3 of the contract franchise provides "pursuant to the municipality's rate-making power, and the terms and conditions upon which this franchise is given, the municipality establishes the following rates and charges for natural gas service in Jackson for gas taken from the Jackson, Mississippi, natural gas field or from commercial gas field within 40 miles radius within the State of Mississippi," followed by the schedule. No authority is given by this contract franchise, accepted in writing by respondent, to change the rates during the twenty-five year term and no such authority is found in the laws of Mississippi. The rates so fixed are binding upon consumers as

well as respondent. *Griffith* v. *Vicksburg Water Works Company,* 88 Miss. 371, 40 So. 1011. The right of a municipality to fix rates has been fully recognized by the bench and bar of Mississippi. In *City of Laurel* v. *Mississippi Gas Company,* 49 F. (2d) 219, District Judge Holmes, now a judge of the Circuit Court of Appeals for the Fifth Circuit, and familiar with the laws and procedure in Mississippi, says "The City of Laurel has the power to prescribe charges and reasonable rates for gas, provided they do not impair the obligation of any valid existing contract. Sec. 2426, Mississippi Code, 1930." The petition here necessarily seeks to suspend the old rate and substitute a new; to accomplish by indirection what respondent could not directly do; to violate the principles announced by the Court in *Aetna Casualty & Surety Company* v. *Quarles,* 92 F. (2d) 321, that "the object of the statute is to afford a new form of relief where needed, not to furnish a new choice of tribunals or to draw into the Federal Courts the adjudication of causes properly cognizable by Courts of the State." We submit, therefore, that this is essentially a rate case. It is true that the contract franchise provides that if the Jackson field becomes insufficient, respondent has the option to obtain natural gas from other fields, but "rates therefor shall be fixed hereunder that are just and reasonable." Exhibit "A", Sec. 5 (Tr. 24-25). To exercise this option, respondent in all events must have the City, as a rate-making body, fix rates for pipeline gas. This presents a separate question for the consideration of this Court, to-wit:

2. It was never the purpose of the Declaratory Judgment Statute to permit the trial of a cause piece-meal or to make any adjudication unless it disposes of the whole controversy. The effect of the judgment here complained of would be to permit the Federal District Court to try a purely fact issue when it has not the power to enforce its

judgment, and to justify its reasoning, the learned Court of Appeals eliminates any consideration of the averments pertaining to rates or the remedy to enforce any judgment, leaving to some other court or tribunal the application of the restricted declaration about the sufficiency or insufficiency of the Jackson gas field. Suppose the learned District Court finds that the Jackson field is insufficient. What then? What is the effect? It does not validate the new rates. It leaves the City of Jackson and its inhabitants without a rate, and leaves respondent without a contract. Instead of affording security to the parties, it leaves the fundamental issues undetermined. While the contract franchise has several provisions, it is after all one contract. It was never the purpose of the Declaratory Judgment Statute to authorize the Federal Court to try a purely fact issue without applying the law as to the substantive rights of the parties to the facts so found and entering a judgment disposing of the whole controversy. The fact issue as to the sufficiency or insufficiency of the Jackson gas field is only one issue in the case. What respondent is primarily interested in is the establishment of a new rate. It has not made the proper approach. It merely seeks to make the Federal District Court a commissioner or fact-finding agency without power to enforce its judgment. "The declaration of a right without the power to make it effective would appear at first impression to be a vain proceeding." *Lake Erie Provision Company* v. *Moore,* 11 Fed. Supp. 522. In prior litigation between these very parties, *Mississippi Power & Light Company* v. *City of Jackson,* 9 Fed. Supp. 564, Mr. Justice Holmes, then District Judge, said "as to relief in the State courts, Sec. 2426, Mississippi Code, 1930, provides that the Chancery Court shall have jurisdiction to review orders of municipal authorities in the matter of fixing rates to be charged by public service companies. * * * This court has no jurisdiction over the contro-

versy, not even under the Declaratory Judgment Act of June 14, 1934 (Sec. 274 d of Judicial Code, 28 U. S. C. A. Sec. 400), as that act only confers the power upon courts of the United States to declare rights and other legal relations of interested parties in cases of actual controversy over which the court otherwise has jurisdiction under the Constitution and laws of the United States. It does not extend the general jurisdiction of federal courts to new cases or controversies, but merely creates a new procedural institution or enlarged remedy for the limited classes of cases and controversies cognizable in these courts." The learned District Judge further held in that case that "irrespective of said Sec. 2426, the Chancery Courts of Mississippi have an independent equitable jurisdiction to prevent by injunction the enforcement of municipal ordinances which are void because confiscatory of the plaintiff's property. *Fitzhugh* v. *City of Jackson*, 132 Miss. 585, 97 So. 190, 33 A. L. R. 279."

If the Jackson field is insufficient, then many elements must be taken into account in the establishment of new rates, and all this cannot be done in the Federal Court. Respondent has wrongfully assumed to put into effect the new rate and then in effect to request the Federal District Court to approve its actions. It has no legal right to sit in judgment on its own case and then ask a validation proceeding in the Federal Court. Furthermore, as said by Mr. Justice Frankfurter in his concurring opinion in the recent case of *Driscoll* v. *Edison L. & P. Co.*, 307 U. S. 104, 122, "the determination of utility rates does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment." The learned Circuit Court of Appeals cited for its justification *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617. The issue there was practically a single issue, to-wit, whether the insured

"had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums," etc., and the learned Chief Justice observed "There would be no difficulty in either event in passing a conclusive decree applicable to the facts found and to the obligations of the parties corresponding to those facts." Here a different situation is presented. The learned District Judge could pass no conclusive decree applicable to the facts found and the obligations of the parties. All the Federal District Court could do would be to say that the Jackson gas field is insufficient without requiring either of the parties to do anything, with the result that we would have "confusion worst confounded."

3. When the learned District Judge sustained the motion to dismiss, the City of Jackson had pending a suit against respondent as shown by the admissions of learned counsel for respondent on page 27 of their brief in chief before the Circuit Court of Appeals, wherein they state "Incidentally, the City in the State court has filed a suit against this plaintiff seeking relief as follows:" and quoting the prayer for relief. The admissions of counsel may always be accepted at face value. "The trial court may direct a verdict upon the opening statement of counsel." *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 221, 26 L. Ed. 539. Mr. Justice Holmes, in prior litigation between the parties hereto, had expressly ruled that the Chancery Court has jurisdiction. The fact is that respondent removed this State court case to the Federal court, and the learned District Judge remanded the cause. The learned District Judge knew, therefore, that all of the issues between the parties, including the fact issue as to the sufficiency or insufficiency of the Jackson field was at issue in said State court action, a court of competent jurisdiction. He delivered no written opinion. The judgment simply dismisses the cause "for lack of juris-

diction." The court had the discretion to decline jurisdiction, among other reasons, the pendency of this State court action. "Whether the remedy shall be accorded one who petitions for it, is a matter resting in the sound discretion of the trial court, to be reasonably exercised in furtherance of the purposes of the statute." *Aetna Casualty & Surety Company* v. *Quarles,* 92 F. (2d) 321. "The granting of a Declaratory Judgment lies considerably within the discretion of the court, after mature consideration of all of the circumstances of the case." *Lumberman's Mutual Casualty Company* v. *McIver,* 27 Fed. Supp. 702. See Annotation 87 A. L. R. 1201, 1212, under the caption "Relief as being discretionary," wherein the learned editor says "As pointed out in previous annotations on the subject, the granting of declaratory relief is a matter as to which the court is entitled to exercise a judicial discretion according to the circumstances presented in the particular case." In *City of El Paso* v. *Texas Cities Gas Company,* 100 F. (2d) 501, the Circuit Court of Appeals for the Fifth Circuit, speaking by Mr. Justice Sibley, expressly approved the doctrine that notwithstanding technical jurisdiction the Federal Court should not interfere "in state matters until state remedies have been exhausted," and that this principle is founded "in comity rather than on want of power either as a federal court or as a court of equity," and in *Commonwealth of Pennsylvania* v. *Williams,* 79 L. Ed. 384, 96 A. L. R. 1166, this Court held that the Federal courts should exercise "their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." See also *Gilchrist* v. *Interborough Rapid Transit Company,* 279 U. S. 159, 73 L. Ed. 652. In *Railroad Commission of State of California* v. *Los Angeles Railway Corporation,* 74 L. Ed. 234, headnote 4 reads "The Supreme Court is bound by the decisions of the highest courts of the states as to the powers of their

municipalities." This power here embraces that of prescribing a reasonable rate. The learned District Judge therefore was familiar with the pleadings in the State court action, having reviewed them on motion to remand, and the prayer for relief quoted by opposing counsel demonstrates that the issue here presented is now pending in a State court of competent jurisdiction and the learned District Judge had intimate knowledge thereof and based thereon the right to exercise a sound discretion in declining jurisdiction on the petition for a Declaratory Judgment.

4. The opinion complained of, we submit, is contrary to the principles announced by other courts of equal dignity in reference to tax cases. The opinion concedes that the Declaratory Judgment Statute has an express exception "with respect to federal taxes." Suits to enjoin either State or Federal taxes would be excepted. The same section which delimits Federal jurisdiction to enjoin, suspend or restrain the enforcement, operation or execution of any order of a rate-making body, likewise provides that no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State, etc., under certain conditions. U. S. C. A. 28 Sec. 41 (1). In *Sears, Roebuck & Company* v. *Roddewig*, 24 Fed. Supp. 321, the statutory three-judge court, speaking for Judges Dewey, Sanborn and Bell, considered a bill of Sears, Roebuck & Company, a corporation, engaged in the business of retail merchandising, alleging that the Iowa sales tax statute was illegal and void as there administered and asked that the defendants be enjoined and restrained from entering any order canceling a permit issued to the plaintiff in operating 13 retail stores in Iowa. The Iowa State Board of Assessment and Review had adopted a resolution reciting the failure of the corporation to collect the use tax or

to make quarterly reports thereof in accordance with the mandatory provisions of the statute. The company did not appear at the hearing fixed by the Board, but instead filed its action in the Federal court. The defendants answered and also made a motion to dismiss for lack of jurisdiction. The court reached the conclusion that it had no jurisdiction, observing "A suit to enjoin a tax and a suit to enjoin the use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other." Let it be remembered that the plaintiff was simply asking that the defendants be enjoined from entering any order canceling any sales permit issued to it. The court further observed "In a broad sense this may properly be regarded as a suit to enjoin the collection of taxes—although there is much force in complainant's argument that it is merely a suit to prevent the Board from revoking complainant's right to do business in the State because of its justifiable refusal to act as a collection agent for the State with respect to its customers," etc. There was just as much sound reason for the court assuming jurisdiction in that case as there is in the case at bar. Turning then to another tax case, *William B. Scaife & Sons Company* v. *Driscoll, Collector of Internal Revenue* (C. C. A. 3rd) 94 F. (2d) 664, the appellant, a manufacturing corporation, filed with the Collector of Internal Revenue its capital stock return as a basis for capital stock tax and excess profits tax. Subsequently an amended return was prepared and transmitted to the Collector who refused to accept it. A bill was filed to have the tax "declared unconstitutional or, in the alternative, to enjoin the Collector from refusing an amended return in lieu of an original return." On dismissal of the bill, the plaintiff appealed. Notwithstanding the fact that the Johnson Act "specifically excluded questions of federal taxation from the operation of the Declaratory Judgment Act", the appellant urged that the Collector

should be compelled to accept and file the amended return. The Court of Appeals, among other things, said "if the appellant can succeed in this purpose, the tax thus assessed will be smaller in amount than that which would be assessed upon the basis of the first return. The suit at bar, therefore, is in reality one to restrain the assessment and the collection of a tax." Now, in the case at bar, if respondent can obtain a binding declaration that it is not bound by Exhibit "A", it necessarily follows that the proceeding is in reality one to enjoin or suspend the rates fixed by the City of Jackson as a rate-making body and agreed to by respondent as reflected in the contract franchise, Exhibit "A". In the last named case, the court also said "We are also of the opinion that appellant has an adequate remedy at law", and here at all times the Chancery Court of Mississippi has jurisdiction to review the reasonableness of rates. The provision that rates for pipeline gas would be established in event the Jackson field became insufficient was manifestly incorporated in the contract franchise to prevent respondent from being bound for the full period of twenty-five years if such contingency occurred. But the contract franchise does not, of course, undertake to fix the rates for pipeline gas, and they have never been fixed or agreed to. A municipality would have no authority to surrender its police power delegated to it by the Mississippi Legislature to fix rates by contracting with respondent that if it could not obtain a sufficient quantity of gas from the Jackson gas field, it would be at liberty to contract for pipeline gas at any schedule of rates which this utility company might think proper, and such was not the contemplation of the contract franchise.

The pronouncements of the lower court are contrary to the ruling of Holmes, District Judge, in *Mississippi Power & Light Company* v. *City of Jackson*, 9 Fed. Supp. 564, hereinabove referred to, and reflecting a similar controversy be-

tween these same parties. It conflicts with the principles announced in *Southern Pacific Company* v. *McAdoo,* (C. C. A. 9th) 82 F. (2d) 121, wherein the Court aptly said:

> "The Declaratory Judgment Act (Judicial Code, Sec. 274 i, 28 U. S. C. A. 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the Federal Courts if affirmative relief were sought. Putnam *v.* Ickes, 64 App. D. C. 339, 78 F. (2d) 223, 226; Zenie Bros. *v.* Miskend (D. C. S. D. N. Y.) 10 F. Supp. 779, 781; Automotive Equipment *v.* Trico Products Corp. (D. C. S. D. N. Y.) 10 Fed. Supp. 736, 738; Miss. P. & L. Co. *v.* Jackson (D. C. S. D. Miss.) 9 Fed. Supp. 564, 570; Hary *v.* United Electric Coal Co. (D. C. E. D. Ill.) 8 Fed. Supp. 655, 656. See, also, U. S. *v.* West Virginia, 295 U. S. 463, 475, 55 S. Ct. 789, 79 Law Ed. 1546. The mere fact that a declaratory judgment is sought is not, of itself, a ground for Federal jurisdiction."

It will be observed that among other authorities cited by the Court in the above quotation is the case of *Mississippi Power & Light Company* v. *City of Jackson,* decided by Judge Holmes, now a member of the Circuit Court of Appeals for the Fifth Circuit, but taking no part in the decision here complained of. It is contrary to the decision in *Davis* v. *American Foundry Equipment Company,* 94 F. (2d) 441, wherein the Court, among other things, said "There must exist, as heretofore, the essential grounds for Federal jurisdiction. * * * The law created no new substantive rights or legal relationships but added to the remedies previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of the parties." It conflicts with the observations of the District Court in *Lake Erie Provision Co.* v. *Moore,* 11 Fed. Supp. 522, that "The declaration of a right without the power to make it effective would appear at first impression to be a vain proceeding. * * * Re-

lief under the Declaratory Judgment Statute only may be had where the Court has jurisdiction (includes power) to grant it." It seems to be conceded even by the Circuit Court of Appeals that here the Federal District Court would have no power to grant ancillary relief. As already observed, *supra*, it conflicts with the pronouncements of the Court in *U. S. F. & G. Company* v. *Koch*, 102 F. (2d) 288, upholding the discretionary power of the Court, especially where the judgment "will not finally settle the rights of the parties."

The opinion is not justified, but, on the contrary, conflicts with the opinion of this Court in *Aetna Life Insurance Company* v. *Haworth, supra*, for the reason that in the *Haworth* case this Court held that "a conclusive decree applicable to the facts found and to the obligations of the parties corresponding to those facts" could be entered without difficulty. Here a different situation is presented. No decree could be entered with reference to the new and higher rates, and at most the District Court could only determine one fact issue in a case involving many issues, both of law and fact.

Conclusion.

We have attempted, briefly, to show that this is an important question of jurisdiction; that a final decision on this important question of jurisdiction by this Court would be to the best interest of both parties; that the learned District Court was right in dismissing this cause for the several reasons assigned. It is respectfully submitted that the petition for certiorari should be granted.

J. Morgan Stevens,
W. E. Morse,
Attorneys for Petitioner.

Of Counsel:
Stevens & Stevens,
Jackson, Miss.

APPENDIX.

Secs. 2393 and 2426, Mississippi Code of 1930, are as follows:

"2393. POWERS OF MAYOR AND BOARD OF ALDERMEN.—The mayor and board of aldermen of every city, town, and village shall have the care, management, and control of the city, town, or village and its property and finances, and shall have the power to enact ordinances for the purposes hereinafter named, and such as are not repugnant to the laws of the state, and such ordinances to alter, modify, and repeal; and they shall have power."

"2426. THIRTY-THIRD.—MAY PRESCRIBE MAXIMUM RATES AND CHARGES FOR WATER, POWER, LIGHTS OR GAS.—To prescribe by ordinance maximum rates and charges for the supply of water, gas and electric energy or current for lights and power, or either, furnished by an individual, company or corporation to the municipality and its inhabitants, or either, such rates and charges to be just and reasonable. If the rates and charges prescribed be unjust and unreasonable, they may be reviewed and determined by the chancery court of the county, but the authority hereby granted shall not be construed so as to impair the effect or obligation of any valid or binding contract with any waterworks company, electric light company or gas company, now existing or heretofore made."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 779

CITY OF JACKSON, ET AL.,

vs.

MISSISSIPPI POWER & LIGHT COMPANY.

RESPONSE OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI, WITH SUPPORTING BRIEF.

MARCELLUS GREEN,
Jackson, Mississippi;
R. A. HENDERSON,
2 *Rector St., New York City;*
A. M. NELSON,
Jackson, Mississippi;
FORREST B. BACKSON,
Jackson, Mississippi;
GARNER W. GREEN,
Jackson, Mississippi;
Attorneys for Respondent.

REID & PRIEST,
2 *Rector St., New York City.*
GREEN & GREEN,
Jackson, Mississippi.
JACKSON, YOUNG & FRIEND,
Jackson, Mississippi, Of Counsel.

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RESPONSE OF MISSISSIPPI POWER & LIGHT COMPANY TO PETITION FOR CERTIORARI, WITH SUPPORTING BRIEF.

PARTIES TO LITIGATION:

City of Jackson (with its officials), Petitioner in this Court, was appellee in the Court of Appeals and defendant in the District Court, herein sometimes called (and so substituted in quotations) City, Petitioner or municipality;

Mississippi Power & Light Company, Respondent here, was appellant in the Court of Appeals and plaintiff in the District Court, herein called (and so substituted in quotations) Company, plaintiff or grantee.

"Opinions Below.

"No opinion was delivered by the District Court, but the judgment correctly appears in the petition herein

(R. 92). The opinion of the Circuit Court of Appeals is set forth, (R. 101 to 105 inclusive), (Appendix C hereto), and the judgment of the Circuit Court of Appeals is correctly set forth in petition herein, (R. 106). Otherwise the opinions and judgments below are not yet officially reported."

Questions Involved.

Whether or not the Federal District Court was deprived by the *Johnson Act* (Judicial Code, Section 24, as amended, 28 U. S. C. A., Section 41(1), 48 Stat. 775, printed as Appendix A) of jurisdiction to declare under *Declaratory Judgment Act* (Section 274(d), Judicial Code, 28 U. S. C. A. Section 400, as amended June 14, 1934, Chapter 512, 48 Stat. 955, as amended August 30, 1935, Chapter 829 Section 405, 49 Stat. 1027, Appendix B) that under the terms of the franchise contract, Exhibit A to the complaint, there is available from the Jackson Gas Field sufficient natural gas for the requirements of the City; or differently, whether or not, there being admittedly an insufficiency of natural gas therein, Company may have thereasto a judicial declaration as to its rights under said Exhibit A between City and Company.

Preliminary Statement.

On June 18, 1940, District Judge Mize dismissed solely for want of jurisdiction, under the *Johnson Act,* a petition for Declaratory Judgment filed by Company against City, seeking a declaration of Company's rights under a written contract, Exhibit A (R. 19), to supply City natural gas, initially to be taken from the Jackson Gas Field, which supply Company claimed had become insufficient for the performance of that thereunder required. This claim the City both judicially and extra-judicially denied. Compare Exhibit "G", Ordinance of the City (R. 76), "There is

now a sufficient supply of natural gas in the Jackson Gas Field *to supply all Jackson consumers.*" (Italics ours, unless otherwise noted.)

Upon appeal, on January 17, 1941, the Court of Appeals for the Fifth Circuit (Hutcheson, Circuit Judge, delivering the opinion), declared:

> "Here the City and the Company, under contractual relations with each other, which oblige the company to furnish gas at rates fixed in the contract while the Jackson Field holds out, and specifically relieve it from so doing when the field has failed, are at loggerheads over the facts upon which their respective rights and duties depend and therefore over their respective rights and duties under the facts.
>
> "The company insists that the field is insufficient, the city that it is sufficient. Acting upon its view, the company has made arrangements for bringing in pipe line gas from a distance and is undertaking to exact and collect for that gas, higher rates than those provided for in the contract. The city insisting that the field is sufficient and the contract still holds is resisting these efforts.
>
> "An authoritative determination as to the present status of the contract and of the rights and duties of the parties under it is essential in the interests of both city and company and of the public that both serve. For such a case, the declaratory judgment act is made to order. Borchard Declaratory Judgments, pages 187, 188, 417, 424, 426, 433, 436, 566, 606, 101 A. L. R. 694."

Thereasto the city seeks certiorari.

Statement of the Case.

Jurisdiction of District Court.

The Company invoked the *Declaratory Judgment Act*, predicating Federal Jurisdiction upon (a) diverse citizenship, (b) rights arising under the Constitution, with jurisdictional amount involved (R. 3).

The Complaint.

The Company operates a gas distribution system at Jackson, Mississippi (R. 3), having

(1) A perpetual franchise granted February 10, 1860 (*Laws Mississippi,* 1860, page 438), pursuant whereto gas works were constructed, a part of which is still operated by Company;

(2) A franchise granted to M. H. Grossman (R. 4);

(3) The contract which is the basis of this controversy, Exhibit A to the Complaint, executed October 20, 1930, and epitomized thus:

Section 2. This franchise was for 25 years and was conditioned on Company "furnishing gas to the City of Jackson and the inhabitants * * *, that is, natural gas shall be furnished to the inhabitants of the City of Jackson *as long as commercial natural gas is produced in commercial quantities* in the City of Jackson * * * *sufficient to supply the demands of the City* of Jackson and its inhabitants and its industries," (herein called Jackson gas or Jackson Field).

> "Should the grantee herein, through any medium, except with the consent of the City of Jackson, raise the rates stipulated in paragraph 3 hereof during the time that gas *is furnished or can be so furnished in the City of Jackson* * * * then the City of Jackson may purchase said property on the terms and conditions hereinafter set forth.
>
> "* * * Company gives option to the City of Jackson to purchase its natural gas equipment * * * the terms of the option" are * * *
>
> "In the event of the raise of rates as designated in paragraph 3 * * * the City will have four months from the effective day of this raise * * *, within which to notify the grantee in writing * * * of

its election to exercise its option to purchase * * *'' at "the true or actual value of the physical properties, properly depreciated at that time." (R. 22.)

Section 3. "Pursuant to the municipality's rate-making power, and the terms and conditions upon which this franchise, is given, the municipality establishes the following rates and charges for natural gas service in Jackson for gas taken from the Jackson, Mississippi, natural gas field * * *'', and therein were then prescribed the following rates, domestic, commercial, heating, industrial and municipal, but all said rates were for gas "taken from the Jackson, Mississippi, natural gas field, * * *."

Section 5. "*Should Jackson gas field * * * become insufficient for the performance of that herein required of* grantee, *it may thereafter,* and not before *obtain natural gas from other fields* and *rates therefore shall be fixed hereunder that are just and reasonable.*"

Section 8. "The grantee shall, as far as practical, furnish gas * * * from and after the date on which this ordinance goes into force and effect to all individuals, businesses and industries, within the corporate limits of the City."

The Company's Complaint then averred:

The Jackson gas field for many months last past, especially at February 7, 1940, and continuously since, was "insufficient for performance of that requires * * *."

Particularizing, in part, thereasto:

(a) Gas is drawn directly from the wells, the demand varies, being greatest between 8 and 9 a. m., (Exhibit B, R. 32). "The maximum available hourly production * * * at January 19, 1940, (was) not in excess of 1,543,000 Cu. Ft. per hour * * * yet the maximum requirements of Company was then and now is (R. 10) 1,778,500 Cu. Ft. per hour for the Jackson system, (Exhibit B-1), with at least

280,900 Cu. Ft. per hour safety factor, (Exhibit B-2), * * *." The demand therefor rapidly is increasing (Exhibit C). "It has increased more than five times since 1930."

Exhibit E is a graphic representation of the decline of gas wells in the Jackson Field. "Said gas wells in said Jackson Field will continue to decline, so that within a period of to-wit, one year or less, there may be no Jackson Gas available at all, but certainly nothing like an adequate or dependable supply." (Exhibit E).

(b) As a public utility, without other gas available than that from the Jackson Field, Company had to anticipate and being advised by the United Gas Public Service Company (herein called United, which was a large furnisher of gas) in 1939 of this condition, a pipeline was constructed, costing more than $3,000,000, making available at Jackson pipeline gas.

(c) Company does not own gas gells, has no contract relation with such owners other than as averred, and the remaining gas "is not available" and renders the supply at Jackson insufficient.

City wrongly pretends there is no insufficiency as from December 26, 1939 to January 25, 1940, 780,000 MCF were withdrawn from the Jackson Field, while the consumption within the City of Jackson was 530,392 MCF. This claim erroneously fails to take into account these essential facts:

(1) The hourly rate of consumption and the gas available to meet the hourly requirement determines the insufficiency of the supply;

(2) Other persons were lawfully entitled to dispose of the gas (R. 13): therefore, not all of the Jackson field gas was available to Company;

(3) Insufficiency must not be allowed to actually occur, but arrangements must be made in advance to give a con-

tinuing dependable supply and Company could not wait until the time of failure to make the supply sufficient;

(4) The wells were being drained and could not meet the hourly requirement.

> "Company avers that notwithstanding the excessive draft, there was not and is not presently, as at February 7, 1940, or at any time since, nor will there be from said Jackson gas field at any time in the future (unless new discoveries are made, which are not now available), natural gas in commercial quantities sufficient in the Jackson gas field to meet Jackson's requirements under said Exhibit A" (R. 14).
>
> * * * * * * *
>
> "This gas is wholly inadequate to supply said City's demand but will cause in said City a gas famine, with disastrous results to all concerned. The right thus to furnish pipeline gas said City wrongfully assumes to deny and thereasto there is between Company and City an actual controversy whereasto a declaration is absolutely requisite and essential."

Company is continuing to serve to Jackson citizens all available Jackson gas, but has been required to the extent of 36.59% to take pipeline gas to supplement the insufficient local supply, and "Company is entitled under said contract to have this right established and adjudged" (R. 15).

> "Wherefore, Company prays * * * upon the final hearing, a declaration be had as between Company and City, * * *, that——
>
> "(a) Under said Contract, Exhibit A, Company has a right, as now, and from February 7, 1940, to furnish in said City pipeline gas, * * *
>
> "(b) That under said contract, Company has the right, if the Court be of opinion that said Company may not so furnish pipeline gas, to discontinue furnishing said City and its inhabitants pipeline gas and to leave

the City solely dependent upon that portion of the gas originating from said Jackson field that Company may supply, and for such other, further, and general relief as in equity and good conscience may seem meet." (R. 17).

City's Motion To Dismiss.

The City moved to dismiss upon divers grounds (R. 88). The Court considered only the *Johnson Act* and dismissed solely because of want of jurisdiction (R. 92). Reversal occurred for the reasons set forth in the opinion of Hutcheson, Circuit Judge, appended as Appendix C. Thereto we refer with great confidence for a thorough vindication of the Company's rights.

Statutes Involved.

Section 24, *Judicial Code,* as amended, 28 *U. S. C. A.,* Section 41, (in full Appendix A), may be epitomized thus:

> "* * * The District Courts shall have original jurisdiction * * * of all suits of a civil nature * * *. Notwithstanding the foregoing provisions of this paragraph, no District Court shall have jurisdiction of any suits to enjoin, suspend or restrain the enforcement, operation, or execution of any order of * * * any rate-making body * * *, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Pursuant to Section 274d, *Judicial Code,* 28 *U. S. C. A.,* Section 400, Declaratory jurisdiction is provided:

> "(1) In cases of actual controversy *except with respect to Federal taxes* the courts of the United States

shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declarations, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court *having jurisdiction* to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"* * * (Mar. 3, 1911, c. 231, Sec. 274d, as added June 14, 1934, c. 512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, Sec. 405, 49 Stat. 1027.)"

The sole issue presented to and decided by the District Court was as to the sufficiency, *vel non,* of the Jackson gas field under Sections 2 (R. 20), and 5, (R. 24), under the complaint, as between the Company and the City, to give those rights specifically by the contract, Exhibit A, annexed, to the Company, when the Jackson gas field became "insufficient for the performance of that hereunder required." Thereasto averring such insufficiency, the Company asked declaratory relief.

Hutcheson, Circuit Judge, on appeal, declared, "For such a case, the *Declaratory Judgment Act* is made to order," and excluded from consideration the merits and "the question much discussed in the briefs of both appellant and appellee, with authorities pointing both ways, whether the Declaratory Judgment jurisdiction is discretionary. * * * We are concerned here with questions neither of discretion nor of the merits, but only with whether there was jurisdiction, and we think it plain that there was." (Appendix C.)

Point I.

REPLY TO CITY'S PETITION.

1.

The City overlooks a controlling decision, Maryland Casualty Co. v. Pacific Oil & Coal Co., 85 L. ed. (Adv. Sheets) 455.

Therein, Mr. Justice Murphy stated the facts, in part, thus:

> "Petitioner claimed that this truck was not one 'hired by the insured' and hence that it was not liable to defend the action by Orteca against the insured * * *. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.
>
> "Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sustained his demurrer and the Circuit Court of Appeals affirmed. 111 F. (2d) 214. We granted certiorari on October 14, 1940 (——— U. S. ———, ante, 56, 61 S Ct 25) to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.[1]
>
> "The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an 'actual controversy' within the meaning of the Declaratory Judgment Act (Judicial Code Section 274d, 28 USCA Sec. 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. Nashville, C. & St. L. R. Co. v. Wallace, 288 US 249, 259, 77 L ed 730, 733, 53 S Ct 345, 87 ALR 1191; USCA Constitution, Art. 3, Sec. 2.
>
> "The difference between an abstract question and a

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[1] This point thus decided was adverted to before the Court of Appeals but excluded in its opinion.

'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Aetna L. Ins. Co. v. Haworth, 300 US 227, 239-242, 81 L ed 617, 620-622, 57 S Ct 461, 108 ALR 1000.

* * *

"It is clear that there is an actual controversy between petitioner and the insured. Compare Aetna L. Ins. Co. v. Haworth, supra (300 US 227, 81 L ed 617, 57 S Ct 461, 108 ALR 1000). If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca against petitioner, might conclude otherwise. (Citing cases).

"Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner. (Citing Cases)."

This decision clarifies and settles the right to proceed in the District Court for a declaration, notwithstanding the pendency in the State Court of a complaint. The City, with deference, overlooks that at the same time there was pending before District Judge Mize (a) this complaint for a Declaration; and (b) the complaint by the City for substantially specific performance by the Company. Having

both causes in the same Court, the District Judge remanded one and dismissed the other.

This cause *(Maryland Casualty Company case)* wrought the requisite clarification as to declarations.

2.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 239-242, 81 L. ed. 617, 620-622, 57 S. Ct. 461, 108 A. L. R. 1000, misapplied.

With deference, this decision of this Court was properly followed and applied by Judge Hutcheson, for the City said the Jackson field was sufficient, the Company said it was insufficient. So assuming, the Company arranged to import pipeline gas to avert a gas famine. The City has fixed no rate for pipeline gas (there being no Public Service Commission and the sole power being in the City to regulate rates). The Company, as the owner of the pipeline gas, collected therefor that which it deemed a reasonable price. *Almaras* v. *Hattiesburg,* 180 So. 394, 181 Miss. 752; *Vicksburg Water Works Co.* v. *Yazoo, etc. Co.,* 102 Miss. 504, 59 So. 825; *Bell* v. *Kaye,* 127 Miss. 165, 89 So. 910.

It was not otherwise provided by statute, hence the Company has the primary right to fix the price of its property sold. 13 *C. J. S.* 277, page 328; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 564, 63 L. ed. 772, 777; *Interstate Commerce Commission* v. *Alabama, etc. Co.,* 168 U. S. 168, 42 L. ed. 414, 423; *Cincinnati etc.* v. *Interstate Commerce Commission,* 162 U. S. 197, 40 L. ed. 935, 939. Pursuant to this collection by the Company for the pipeline gas thus furnished, the City presently claims an option upon the Company's property and by reason of the sufficiency, *vel non,* there is also brought about an option, *vel non,* whereasto judicial declaration is requisite, neither having aught to do with rates.

When the declaration is made as to sufficiency, *vel non*, it must be assumed that the City will not become a violator of the law and leave undone those things that it ought to do or do those things that it ought not to do. Mr. Justice Reed in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, U. S. Law Week, February 10, 1941, 4187, said:

> "It is a postulate of reasoned thinking that the judicial decrees will be faithfully carried out."

To have the City advise this Court in advance that it should not make a declaration as to a justiciable controversy because the City will not conform thereto, is not a well-conceived argument. It savors of taking advantage of one's own wrong, *(Allegans suam turpitudinem non est audiendus,* Broom's Legal Maxims; 2 C. J. 1148) of challenging constituted authority. We have no doubt when and if it be adjudged as a fact that the Jackson gas field is insufficient, the City will conform to that adjudication. Should it not so do, there is for this failure adequate remedy, (a) under the Declaratory Judgment Act in a Court "having jurisdiction"; (b) independently of this statute, by reason of the inherent power of the Federal Court as a Court. Compare *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112, 48 L. ed. 629, 639; *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. ed. 477; *Munroe* v. *Raphael*, 288 U. S. 485, 489, 77 L. ed. 910, 24 A. L. R. 1084; *Bethke* v. *Grayburg Oil Co.*, 5 Cir., 89 Fed. (2) 536, Certiorari denied, 302 U. S. 730, 82 L. ed. 564.

3.

City overlooks other controlling decisions of this Court rendering Certiorari not requisite.

Compare *Currin* v. *Wallace*, 306 U. S. 1-5, 83 L. ed. 441; *Nashville, etc. R. Co.* v. *Wallace*, 288 U. S. 249, 77 L. ed. 730, 87 A. L. R. 1191; *United States* v. *West Virginia*, 295 U. S.

463, 79 L. ed. 1546; *Borchard Declaratory Judgment, Annotation* 87 *A. L. R.* 1205; 101 *A. L. R., Annotation* 689.

Wherefore, there is naught further requisite for this Court to do in that regard.

4.

The City overlooks other decisions dealing with the Johnson Act and construing Federal statutes somewhat similar.

(a) Compare *Corporation Commission* v. *Carey,* 296 U. S. 452, 80 L. ed. 325; *Mountain States Power Co.* v. *Public Service Commission,* 299 U. S. 170, 81 L. ed. 101; *Driscoll* v. *Edison Light & Power Co.,* 307 U. S. 108, 83 L. ed. 1134; *Petroleum Exploration* v. *Public Service Commission,* 304 U. S. 209, 214, 82 L. ed. 1294, 1299, and the Fifth Circuit has sought thereto to conform. *City of El Paso* v. *Texas City Gas Co.,* 5 Cir., 100 Fed. (2) 501.

(b) The provision of the *Johnson Act* is no jurisdiction "to enjoin, suspend or restrain the enforcement, operation or execution of any order of any rate-making body," thus directly withdrawing jurisdiction only when that sought was by injunctive process. The *Johnson Act* does not assume to deny jurisdiction of a proceeding to "annul" or "vacate."

Compare the following:

(1) Section 266, where in *Public Service Commission* v. *Brashear Freight Lines, Inc.,* 306 U. S. 207, 83 L. ed. 608, 610, this Court said:

> "Section 266 as originally enacted applied only to cases in which an interlocutory injunction was granted or denied and the purpose was to make interference by such an injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of three judges was likely to secure. Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Serv. Commission, 260 U. S. 212, 216, 67 L.

ed. 217, 222, 43 S. Ct. 75; Stratton v. St. Louis S. W. R. Co., 282 U. S. 10, 14, 75 L. ed. 135, 137, 51 S. Ct. 8. The amendment that the requirement of a court of three judges should also apply to the final hearing on the application for a permanent injunction was to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction."

Compare *Note,* 83 L. ed. 1193; *Phillips* v. *United States,* 85 L. ed. 460.

(2) *Ex Parte Bransford,* 310 U. S. 354, 84 L. ed. 1249.

(3) Commerce Court, *Procter & Gamble Co.* v. *United States,* 225 U. S. 281, 56 L. ed. 1091, where the excision was to "annul" and "set aside."

(4) Section 316 of the *Packers and Stockyards Act, United States* v. *Corrick,* 298 U. S. 435, 80 L. ed. 1263, 1266.

(5) *Urgent Deficiencies Act* of October 22, 1913, *Shannahan* v. *United States,* 303 U. S. 596, 599, 82 L. ed. 1039, 1041.

(6) *United States* v. *Idaho,* 298 U. S. 105, 109, 80 L. ed. 1070, 1074; *Powell* v. *United States,* 300 U. S. 276, 286, 81 L. ed. 643, 644.

Hence, the excision of jurisdiction by the *Johnson Act* under these decisions would not include the present suit.

5.

Further of the City's Petition with Company's comments thereon and thereasto.

(a) The City sharply presents the issue thus:

"The Company had fully complied with the contract; that the Jackson gas field is *presently insufficient for the performance of the contract;* that Company has sought, obtained and is furnishing pipeline gas from foreign fields at rates initiated by it (Company) but not approved by the City as the rate-making power;

> that the City claims that the Jackson field is still sufficient'',

and with this issue thus put by the City, the prayer of the Complaint is—

(1) Under said Contract, Exhibit A, Company has a right, as at now, and upon February 7, 1940, to furnish in said City pipeline gas, and that the rates prescribed by Section 3 of the Contract do not apply thereto (pipeline gas). That Section 3 rates do not apply was conceded in the City's brief (page 74), ''The only rate agreed upon in the contract franchise we admit is for natural gas from the Jackson gas field, but if that becomes insufficient, within the terms and provisions of the contract franchise, the Company is required to obtain natural gas from other fields, then in the language of the contract 'rates therefor shall be fixed hereunder that are just and reasonable','' but Section 3 (R. 22) can leave no doubt thereasto.

(2) ''That under said contract, Company has the right, if the Court be of opinion that said Company may not so furnish pipeline gas, to discontinue furnishing said City and its inhabitants pipeline gas and to leave the said City solely dependent upon that portion of the gas originating from said Jackson field that Company may supply, and for such other, further, and general relief as in equity and good conscience may seem meet'' (R. 17).

Hence, with this factual controversy existent, whereunder the City would take no step until it was adjusted, this complaint for declaration was filed, and when made, this declaration would, if favorable to the Company, cancel the City's claim for an option upon the Company's plant and place the parties litigant in such a status as that each could do that specifically provided by the contract, for the City had covenanted when pipeline gas was essential, to vouch-

safe thereasto just and reasonable rates. (Section 5, R. 25). So, for Jackson gas, Section 3 prescribed specific rates, for pipeline gas, Section 5 provides for reasonable and just rates, and the contract as an entirety was for judicial construction, as to sufficiency, *vel non,* vouchsafing the respective parties different rights.

(b) The City claims, "We submit, therefore, that this is essentially a rate case," and therefore, any declaration in the District Court would contravene the Johnson Act.

Thereto, the Company replies:

(1) The legislative history thereof in Appendix D demonstrates that there was no withdrawal of jurisdiction in such a cause.

(2) This could never be a rate case,—only a contract case.

Columbus R., Power & Light Co. v. *Columbus,* 249 U. S. 399, 63 L. ed. 669, 6 *A. L. R.* 1684; *note* 74 L. ed. 236; *Texarkana* v. *Arkansas-Louisiana Gas Co.,* 306 U. S. 188, 83 L. ed. 598.

In the *Texarkana Case,* pursuant to a somewhat similar contractual provision in its franchise, the Texas City sought rates operative in the Arkansas City, and this Court said, Off. Ed., page 195, L. ed. page 603:

> "Another bill was filed by the Texas City in *May, 1934,* seeking substantially the same relief * * *. The two actions were consolidated. Later motions, pleadings and the decree in the two cases are the same."

Adverting to the cause as reported 97 Fed. (2), page 7, 5 Cir., Hutcheson, Circuit Judge, said:

> "On *May 22, 1934,* the City secured an order of dismissal of its suit then pending, and on the next day filed substantially the same suit as a new proceeding in the state court. This suit was also removed to the

> Federal court, where, that court holding that the dismissal of the City's petition in the first had not effected dismissal of defendant's counterclaim, the City obtained a reinstatement of its first suit, and an order consolidating the two suits for trial."

The Johnson Act became effective May 14, 1934, and neither this Court, the Court of Appeals nor the District Court thought that such a suit was prohibited by the Johnson Act, and we rely confidently on that decision.

(3) Section 3 of the Contract here covers the rates for Jackson gas—with a 950 B. T. U. content, and not pipeline gas with 1,050 B. T. U. content, (R. 4), wherefor the City, when rates therefor are to be fixed must, Section 5, recognize rates "hereunder that are just and reasonable." So that in the same contract, we have rates for Jackson gas, Section 3, rates for pipeline gas, Section 5, and the sole question hereunder is sufficiency, *vel non,* option, *vel non,* and naught else. When sufficiency or insufficiency is adjudged, the City will be presumed to be law-minded. *Omnia praesumuntur legitime facta donec probetur in contrarium. Broom's Legal Maxims,* 948. *Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium. Broom's Legal Maxims,* 944.

(c) The City's petition contends that the Company is not "at liberty to initiate higher rates for pipeline gas on the assumption that the Jackson field is insufficient."

Our answer is:

(1) The City (with sole power to regulate rates) has not acted thereasto for pipeline gas;

(2) Neither the District Court nor the Chancery Court of Hinds County may fix rates.

3 *Pond Public Utilities,* 4th Ed., 1772, Sec. 892; *Southern Bell Tel. etc. Co.* v. *Railroad Commission,* 5 Fed. (2) 77, authorities supra. No approval of the rates fixed for pipe-

line gas is sought, directly or indirectly. Even if such were sought and such approval were beyond the power of the District Court, just as this Court dissolved the injunction in the *Maryland Casualty Company Case,* so here it could delete from the relief that as to rates. Note the complaint in its entirety was dismissed, and if but one right was claimed therein within the Court's jurisdiction, then as to that right, jurisdiction remained.

(3) There is one factual issue: is the Jackson gas field sufficient or insufficient? On that, the evidence will have to be heard unless this Court should, as would the courts in Mississippi, take judicial knowledge of the reports made to the Oil & Gas Commissioner. As Appendix E, we make reference to supplemental figures filed by the City, showing the absolute necessity of that herein asked, which figures were made a part of the City's brief in the Court of Appeals. Under those figures, in January, 1939, as given, the total consumption in Jackson (which we think is too small) was 419,570 MCF; in February, 1939, 390,046 MCF; in January, 1940, 529,416 MCF; in February, 481,917 MCF; and the total monthly production of the field since May, 1940, has not exceeded 515,669 MCF, and as at November, 1940, had declined to 378,131 MCF, thus balanced against the high point of January, 1940, leaving an actual monthly deficit of 151,285 MCF, and this on the face of the City's interpretation of production figures.

Thereasto, we insert as Appendix E, a graph, adopting, but without admitting the City's figures to be correct, and show the monthly production and the monthly consumption. Therefrom, the Court will see that the monthly production is presently below the monthly consumption in winter weather, and relief might be appropriately had under the City's admission therein made.

(4) The City contends in its statement that "thereby (Company) conceding that more gas is produced in the Jackson field than is distributed by the respondent locally", but, with deference, no such concession is made and for the purposes of the jurisdictional question, it is admitted that the field is insufficient.

(5) We disregard in large measure the contention of the City as to the suit remanded to the State Court because there was in the Court of Appeals, and probably would be here, conflict between counsel as to what therein appeared. Not being in the record, we therefore do not further advert to it.

Point II.

REPLY TO CITY'S BRIEF.

Preliminary Statement.

The City consolidated the Specifications of Error and the reasons for granting the petition into four points in the City's argument, and to avoid prolixity and the overlapping in the Specifications, we reply only to these four.

1.

The City contends this complaint is essentially "a rate case" and the Company may not do indirectly what it cannot do directly, hence the Johnson Act divests jurisdiction.

We reply:

(a) To save prolixity we refer to and reiterate Point I, Subdivision 5 (b). (This is a contract case, not a rate case).

(b) The District Court and the Court of Appeals passed on no question other or further than relief under a contract.

The three sections of the contract wereasto a declaration is sought are as follows:

> Section 2,
> "Natural gas shall be furnished to the inhabitants of the City of Jackson *as long as commercial natural*

*gas is produced in commercial quantities * * * sufficient to supply the demands of the City of Jackson * * * .*"

Section 3,

"Pursuant to the municipality's rate-making power, and the terms and conditions upon which this franchise is given, the municipality establishes the following rates and charges for natural gas service in Jackson *for gas taken from the Jackson, Mississippi, natural gas field.*"

Section 5,

"*Should Jackson gas field * * * become insufficient for the performance of that hereunder required of the Grantee, it may thereafter, and not before, obtain natural gas from other fields * * * .*"

So long as the Jackson gas field was sufficient, though the rates in Section 3 were phenomenally low (being the lowest in the United States except at Monroe, Louisiana, where they were the same), Company did not attack or question that rate structure and does not now do so. The Jackson field has become insufficient.

Pursuant to what Company assumed to be its rights under Exhibit A, it brought into Jackson the requisite gas to supply the deficiency, under a contract with the United, who made deliveries therefor from its pipelines at City Gate, amounting, as at February 7, 1940, to 36.59% of all the natural gas consumed in Jackson. (Tr., 15). Having been compelled to pay to the pipeline for this interstate gas, moving under the *Natural Gas Act*, (15 U. S. C. A., p. 784, 52 U. S. Statutes, 821, Section 717 (a)), Company established as to all consumers at Jackson the ratio existing between the pipeline gas and the Jackson field gas consumed during the month. For the proportion of gas from the Jackson Field, Company charged the Jackson rates prescribed in Section 3. For the proportion of the pipeline gas, it charged reasonable rates, predicated upon the cost of pipeline gas, as to which pipeline gas, the City has not yet taken any regulatory action. The City challenged Company's declara-

tion of insufficiency, declaring by ordinance (Tr., 76), "There is now a sufficient supply of natural gas in the Jackson field to supply all Jackson consumers." The City admits Company's right to supply pipeline gas if the Jackson field be "insufficient".

Herein, the District Court dismissed in its entirety, denying the right of the Company to have even an adjudication as to the option on its property, *vel non,* by reason of sufficiency of the Jackson field, *vel non.* Surely, the existence of an option is appropriate for declaration.

> "The Company contends that a proper construction of the franchise, Exhibit A, in view of the facts prevailing, is that the Jackson gas field is now insufficient for the performance of its obligation under the franchise to supply the City of Jackson, its citizens and its industries, and that, therefore, the Company is free to supply gas derived from sources other than the Jackson field, and under the franchise the Company is not required to continue furnishing gas imported over pipelines at the rates for Jackson field gas prescribed in Section 3 of the franchise contract.
>
> "The nub of the controversy is the fact, *vel non,* of the sufficiency of the natural gas in the Jackson field to supply the City of Jackson, its industries and its inhabitants, within the meaning of the Jackson Franchise contract.
>
> "We now proceed to point out, in the absolute, matters which are not involved in the controversy.
>
> "No question of restraining any order of the governing body of the City of Jackson or any other governmental body is involved. No injunctive relief, directly or indirectly, is sought (R. 20—Section 20 of the Complaint). No application for an injunction has been made by the Company.
>
> "If the District Court upon the merits should find as a fact, under the Jackson franchise contract, that the supply of gas from the Jackson gas field was sufficient for the requirements of the City of Jackson, its

industries and its inhabitants, the Company would be obligated to supply Jackson field gas at the rates prescribed by Sections 2 and 3 of the contract (R. 20, *et seq.*). Inasmuch as in such an event the Jackson gas field would be found sufficient, the question of any obligation or right to supply pipe line gas would cease to be involved.

"On the other hand, if the District Court should find the supply of gas from the Jackson field to be insufficient under the Jackson franchise contract, the company would become entitled under Section 5 of the Jackson franchise contract to supply natural gas from other fields at rates which shall be fixed that are just and reasonable, or to supply artificial or manufactured gas at rates therefor which shall be fixed that are just and reasonable (R. 25).

"Thus, there is nothing injunctive or restraining about any finding which the District Court could properly make in the course of resolving this controversy. Construction of the franchise contract in light of existing facts is all that is involved in the controversy."

(c) By the *Johnson Act*, Federal jurisdiction was divested only where the suit was "to enjoin, suspend or restrain the enforcement, operation or execution" thereof.

This suit does not seek, directly or indirectly, to "enjoin, suspend or restrain the enforcement, operation or execution" thereof.

This suit does not seek, directly or indirectly, the enforcement, operation or execution, but asks that a franchise contract, not an order, be judicially interpreted in order that it may thereafter be put in operation and executed as the parties were by its terms obligated. Compare *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188, 83 L. ed. 598; *Interstate Natural Gas Co.* v. *Louisiana Public Service Commission*, (D. C. La.), 33 Fed. Supp. 50, 59; 34 Fed. Supp. 980.

"There is no substance to petitioner's assertion that the decision of the Circuit Court of Appeals herein con-

flicts even with that of the District Court rendered in 1935 in Mississippi Power & Light Co. *v.* City of Jackson, 9 Fed. Supp. 564. In that case the complaint sought to enjoin temporarily and permanently an Ordinance of the City of Jackson establishing electric rates. It was an out and out rate case, seeking to restrain the rate fixing ordinance, quite apart from any franchise. The case at bar more nearly resembles the case of Anderson, Clayton & Co. *v.* Wichita Valley R. Co., State of Texas, Intervenor, 15 Fed. Supp. 475, affirmed 92 F. (2d) 105, certiorari denied 302 U. S. 747, rehearing denied 302 U. S. 780. In the District Court for the Southern District of Texas, Anderson, Clayton & Company had sought successfully to have determined whether certain shipments of cotton were shipments in "interstate" and "foreign" commerce within certain rate regulations promulgated under the Interstate Commerce Act. The District Court held that the complainant was entitled to a declaratory judgment with respect to the character of the shipments within the purview of those certain rate schedules and that the rate schedules of the Texas Railroad Commission did not apply."

The Jackson gas field is insufficient and Company, therefore, has the right to introduce pipeline gas. The Company may be compelled to serve as a public utility, *State ex Rel.* v. *Benson*, 108 Miss. 779, 67 So. 214. It must make reasonable and proper efforts to accommodate itself to a failure of the gas supply, *Railroad Co.* v. *Blum Co.*, 88 Miss. 188, 42 So. 282; *Yazoo, etc. R. R. Co.* v. *McKay*, 44 So. 780, 91 Miss. 150; *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401, 31 A. L. R. 330, and the Company must be vouchsafed by declaration those rights given by Exhibit A as to putting into operation and execution that validly obtained as to supplying Jackson with pipeline gas when and after the Jackson field became insufficient.

(d) The *Johnson Act* in no way applied, directly or indirectly, to the course of conduct followed in this cause.

(e) Assuming, but not conceding, the franchise contract to have been an order and the action one to enjoin it, yet the *Johnson Act* divested jurisdiction only after reasonable notice and hearing. The City declared that the supply was sufficient, and having thus declared, they would take no further action thereasto. This made, under the decisions of this Court, the *Johnson Act* inapplicable.

(f) The City having declared by ordinance the supply sufficient, without notice, refused to act further, and further approach would have been futile as the City still maintains the supply is sufficient. Hence, no further application was requisite. *Hills* v. *National Albany Exchange Bank*, 105 U. S. 319, 26 L. ed. 1053.

(g) Furthermore, it is very doubtful whether Section 2426 provides a reasonable notice, as required by the *Johnson Act*. Compare *Mississippi Power Co.* v. *Aberdeen*, 11 Fed. Supp. 952; but see *Mississippi Power & Light Co.* v. *Jackson*, 9 Fed. Supp. 564.

(h) Section 2426 may be unconstitutional as assuming to vest this jurisdiction in the Chancery Court. Compare Section 156, *Constitution of Mississippi*, providing:

> "Section 156. The Circuit Court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law."

Section 2426 originated in Chapter 231, *Mississippi Laws* 1904, so that as at 1890, the date of the Constitution, there was no revisory jurisdiction in the Chancery Court and no Court in Mississippi may fix rates. Authorities, *supra*.

(i) *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011 did not involve this statute. As to further litiga-

tion about the water rights in Vicksburg, see *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1135.

(j) *City of Laurel* v. *Mississippi Gas Co.*, 49 Fed. (2) 219 merely dealt with the right to regulate rates. Presently there are no rates in Jackson for pipeline gas. It may well be that the Company's fixation thereof under the act of 1860 is conclusive whereby the Directors "of said Gas Light Company * * * shall make all needful rules and regulations for the management of said Gas Works and fix the terms and conditions on which gas will be supplied to consumers." *Gulf & Ship Island R. Co.* v. *Laurel Oil & Fertilizer Co.*, 159 So. 838, 172 Miss. 630; *Stone* v. *Y. & M. V. R. Co.*, 62 Miss. 607, 116 U. S. 307, 29 L. ed. 636; *Stone* v. *Illinois Central R. Co.*, 116 U. S. 347.

(k) The City then relies upon *Aetna Casualty & Surety Co.* v. *Quarles*, 4 Cir., 92 Fed. (2) 321, which is not in any way contra, for the same day the same Judge decided *Stephenson* v. *Equitable Life Assurance Society*, 4 Cir., 92 Fed. (2) 406, and in *New York Life Ins. Co.* v. *Roe*, 8 Cir., 102 Fed. (2) 28, 31, our conception is sustained.

All questions as to the merits and the discretion were expressly excluded from consideration by the Court of Appeals, and that presented to the District Court was solely a jurisdictional question. The merits of the controversy were not touched in dismissing, the District Court did so because of the supposed limitation of the Johnson Act. The question of an exercise of discretion as to the propriety of a declaration was not properly before the Court and necessarily is not before this Court on this petition, which does not reach any aspect of the merits, but involves the simple issue of jurisdiction.

The Company has entered upon the discharge of its duty to distribute natural gas from foreign fields and therefore what initially was optional, has become probably obligatory.

2.

The City next contends: "It was never the purpose of the Declaratory Judgment statute to permit the trial of a case piecemeal or to make any adjudication unless it disposes of the whole controversy,"

Whereto, we reply:

(a) These matters substantially covered, *supra.*

(b) These aspects are thoroughly settled, with deference, by the decisions of this Court, and that hereunder sought is well within the rule thus laid down, and if the District Court adjudges the Jackson field insufficient, there will be no difficulty in having the City conform thereto.

(c) Pendency of a suit in a State Court in personam never deprived one entitled to relief in the Federal Court from proceeding there.

McClellan v. *Carland,* 217 U. S. 281, 54 L. ed. 762, 767; *Pennsylvania* v. *Williams,* 294 U. S. 176, 183, 79 L. ed. 814; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 67 L. ed. 226; *Kelleam* v. *Maryland Casualty Co.,* U. S. Law Week, February 18, 1941, 4204.

3.

The city next contends that the pendency of the suit in the Chancery Court remanded thereto by the District Court is a bar to the prosecution of this cause in the District Court.

Thereto we have replied fully, *supra,* and the Court of Appeals expressly refused to pass on this point.

4.

Counsel's final point has to do with "The opinion complained of, we submit, is contrary to the principles announced by other Courts of equal dignity in reference to tax cases."

Our reply is:

The City relies upon:

(a) *Sears, Roebuck & Co.* v. *Roddewig,* 24 Fed. Supp. 321, but this had to do with the Iowa use tax. Compare 292 N. W. 130, 238 Iowa ——, and was reversed by this Court on February 17, 1941, U. S. Law Week, February 18, 1941, 4198, with the Chief Justice and Mr. Justice Roberts dissenting. The Johnson Act was not mentioned directly or indirectly.

(b) *William B. Schaife & Sons Co.* v. *Driscoll,* 3 Cir., 94 Fed. (2) 664, and inadvertently refer to the Johnson Act as having been there involved. With deference, therein Counsel err. Said that Court:

> "By Act of June 14, 1934, c. 512, 48 Stat. 955, Jud. Code, Sec. 274d, 28 U. S. C. A. Sec. 400 and note, Congress authorized the finding of declaratory judgments in certain types of cases in the federal courts. Whatever would have been the status of the case at bar under the original Declaratory Judgment Act, a subsequent Act of Congress of August 30, 1935, c. 829, 49 Stat. 1027, Sec. 405, 28 U. S. C. A. Sec. 400, specifically excluded questions of federal taxation from the operation of the Declaratory Judgment Act."

Note Section 400, *U. S. C. A.,* Title 28, *Judicial Code* 274d.

> "In cases of actual controversy *except with respect to Federal taxes* the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for

such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Compare, also, *Revised Statutes,* Sec. 3224, Sec. 1543, Title 26, *U. S. C. A.:*

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

(c) At another point, the City mentions *Southern Pacific Co.* v. *McAdoo,* 9 Cir., 82 Fed. (2) 121, but therein naught contra is found.

(d) At another point, the City mentions *Automobile Ins. Co.* v. *Freundt,* 7 Cir., 103 Fed. (2) 613, but, note, further, *Chase National Bank* v. *Citizens Gas Co.,* 7 Cir., 113 Fed. (2) 217, and naught contra is found.

(e) At another point, the City mentions *United States Fidelity & Guar. Co.* v. *Koch,* 3 Cir., 102 Fed. (2) 288 in no way conflicts with that herein contended for.

(f) *Lake Erie Provision Co.* v. *Moore,* 11 Fed. Supp. 522, may be disregarded. Compare *Currin* v. *Wallace,* 306 U. S. 1, 83 L. ed. 441.

Hence, there is no such conflict as calls for a uniform rule to be announced here, unifying the law, for, with deference, as to all hereunder claimed, the fundamental decisions applying the principles of law applicable are remarkably harmonious. The City has already had one appeal and is not entitled to another.

The importance of maintaining the Federal jurisdiction is vital to this Company's rights. Hence, this appeal therefor is earnestly made. The opinion of the Court below,

with deference, is correct and the petition should be denied, there being no adequate ground therefor assigned.

Respectfully,
MARCELLUS GREEN,
Jackson, Mississippi;
R. A. HENDERSON,
2 *Rector St., New York City;*
A. M. NELSON,
Jackson, Mississippi;
FORREST B. JACKSON,
Jackson, Mississippi;
GARNER W. GREEN,
Jackson, Mississippi;
Attorneys for Respondent.

REID & PRIEST,
2 *Rector St., New York City.*
GREEN & GREEN,
Jackson, Mississippi.
JACKSON, YOUNG & FRIEND,
Jackson, Mississippi, Of Counsel.

I, W. E. Morse, of Counsel for Petitioner, acknowledge receipt of copy of the foregoing Response of Mississippi Power & Light Company with Supporting Brief, this the 25th day of February, 1941.

W. E. MORSE,
Of Counsel for Petitioner.

APPENDIX A.

JOHNSON ACT

28 U. S. C. A., Section 41:

"Section 41. (Judicial Code, section 24, amended.) *Original jurisdiction.* The district court shall have original jurisdiction as follows:

"Section 41, sudb. (1)

"(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is [1] between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board of commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the

ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State. As amended May 14, 1934, c. 283, Sec. 1, 48 Stat. 775; Aug. 21, 1937, c. 726, Sec. 1, 50 Stat. 738; April 20, 1940, c. 117, 54 Stat. 143."

APPENDIX B.

DECLARATORY JUDGMENT ACT

Title 28, Section 400, United States Code Annotated:

"Section 400. (Judicial Code section 274d.) *Declaratory judgments authorized; procedure*

"(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

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[1] So in original. Probably should read "is".

"(3) When a declaration or right or the granting of further relief based thereon shall involve the determination of issues the fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c 231, Sec. 274d, as added June 14, 1934, c. 512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, Section 405, 49 Stat. 1027.)"

APPENDIX C.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 9584

MISSISSIPPI POWER & LIGHT COMPANY, Appellant,

versus

CITY OF JACKSON, et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Mississippi.

(January 17, 1941)

Before Foster, Hutcheson, and McCord, Circuit Judges.

Hutcheson, Circuit Judge: The suit was for a declaratory judgment. The material allegations were (1) that plaintiff had a contract[1] with the City of Jackson to furnish gas from the Jackson Field at rates fixed therein, with

[1] Section 1 granted the franchise.

Section 2 fixed its term at 25 years, conditioned on grantee's furnishing natural gas to the inhabitants of the City of Jackson at the rates shown in the schedule, "as long as commercial natural gas is produced in commercial quantities in the City of Jackson or in a radius of forty miles thereof in the State of Mississippi sufficient to supply the demands of the City of Jackson and its inhabitants and its industries."

Section 3 provided; "Puruant to the municipality's rate-making power and the terms and conditions upon which this franchise is given, the municipality establishes the following rates and charges for natural gas service in

an optional provision to seek gas elsewhere when the Jackson Field became insufficient, and furnish it on adequate rates to be fixed; (2) that it had fully complied with the contract; (3) that the Jackson Gas Field is presently and has been for many months, insufficient for the performance of its contract; (4) that having no sufficient supply of contract gas, it has sought, obtained, and is furnishing pipe line gas from foreign fields; (5) that the city pretends that the Jackson Field is still sufficient, refuses to recognize the changed conditions, insists that plaintiff must furnish gas from the Jackson Field at the rates provided in the contract when there is not sufficient gas there to do so and refuses to fix reasonable rates for the pipe line gas plaintiff is compelled to furnish.

The prayer was for a declaration that; "(a) Under its said contract, plaintiff has a right, as at now, and from February 7, 1940, to furnish in said City pipeline gas, and that the rates prescribed by Section 3 of the contract *do not apply thereto*", "(b) That under said contract, plaintiff has the right, if the Court be of opinion that said plaintiff may not so furnish pipeline gas, to *discontinue furnishing* said City and its inhabitants pipeline gas and to leave the said City solely dependent upon that portion of the gas originating from said Jackson field that plaintiff may supply."

The city filed its motion to dismiss, asserting among other grounds (1) this court has no jurisdiction of the subject matter and (5) it is without jurisdiction, because within the provisions of the Johnson Act, (U. S. C. A. Title

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Jackson for gas taken from the Jackson natural gas field or from a commercial gas field within a forty mile radius within Mississippi."

Section 5 provided; "Should Jackson gas field or all the gas fields in the State of Mississippi within a radius of forty miles of the City, become insufficient for the performance of that hereunder required of grantee, it may thereafter and not before, obtain natural gas from other fields and rates therefore shall be fixed hereunder that are just and reasonable. This provision is purely optional with the grantee and in no wise imposes any obligation on the grantee to maintain its equipment for manufacturing gas or to contract for any gas from any foreign field." It further provided that grantee might under the option, supply artificial gas or a mixture of artificial and natural gas and that just and reasonable rates should be fixed therefor.

28, Sec. 41, Subd. (1), the suit is in effect one to enjoin, suspend or restrain the enforcement, operation or execution of an order of a rate-making body of a political subdivision of the State of Mississippi, to-wit, the City of Jackson.

The district judge without an opinion and without otherwise stating the reasons for his action, entered an order dismissing the cause for want of jurisdiction. Plaintiff is here challenging the order as entered erroneously, because its complaint showed the requisite diversity of citizenship and jurisdictional amount, and an actual controversy within the provisions of the Federal Declaratory Judgment Act, Sec. 274, 28 U. S. C. A., which was not within the prohibitions of the Johnson Act. We agree with plaintiff.

It is quite plain that the Johnson Act aside, a case for the exercise of federal jurisdiction is well stated. For, within the settled rule of the applicable authorities,[2] the complaint presents an actual justiciable controversy, appropriate for declaratory judgment relief. The allegations of the complaint, that plaintiff has been compelled to institute and put in effect, reasonable rates for the pipe line gas it is furnishing, aside, every allegation has to do with and is directed to the single question of a determination and declaration as to whether the Jackson Field is insufficient and if it is, as to the rights of the parties under the changed conditions. The allegations as to rates instituted by the plaintiff are not necessary to the tendered issue, no relief is asked as to them and they may and will be disregarded in the consideration and determination of the issue tendered for a declaration, whether the Jackson Field is insufficient and if it is what are the rights of the parties. *Maryland Casualty Co.* v. *Texas Company,* 114 Fed. (2d) 952.

While the declaratory judgment act has not added to the jurisdiction of the federal courts, it has added a greatly valuable procedure of a highly remedial nature. Extending by its terms to all cases of actual controversy "except with

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[2] Gulley v. Interstate Natural Gas Co., 82 Fed. (2d) 145; Aetna Life Ins. Co. v. Haworth, 300 U. S. 227; Currin v. Wallace, 306 U. S. 1; Davis v. American Foundry Company, 94 Fed. (2d) 441; Aetna Life Ins. Co. v. Martin, 108 Fed. (2d) 824; Maryland Casualty Co. v. Texas Co., 114 Fed. (2d) 952.

respect to federal taxes", it should be, it has been given a liberal construction and application to give it full effect. *Currin* v. *Wallace*, 306 U. S. 1, presents a striking instance of its use in a suit between tobacco warehouse men, auctioneers and the Secretary of Agriculture, to determine the constitutionality and effect of the Tobacco Act of August 23, 1935, while a normal, indeed a common use of it has been in the construction of contracts and the declaration of rights under them. It would be difficult we think, to find a case more appropriate than this one for the application of the act or one more aptly illustrating its beneficial uses.

Here the City and the Company, under contractual relations with each other, which oblige the company to furnish gas at rates fixed in the contract while the Jackson Field holds out, and specifically relieve it from so doing when the field has failed, are at loggerheads over the facts upon which their respective rights and duties depend and therefore over their respective rights and duties under the facts.

The company insists that the field is insufficient, the city that it is sufficient. Acting upon its view, the company has made arrangements for bringing in pipe line gas from a distance and is undertaking to exact and collect for that gas, higher rates than those provided for in the contract. The city insisting that the field is sufficient and the contract still holds is resisting these efforts.

An authoritative determination as to the present status of the contract and of the rights and duties of the parties under it is essential in the interests of both city and company and of the public that both serve. For such a case, the declaratory judgment act is made to order.[3] A large portion of appellee's brief is devoted to a discussion of the merits of the cause. Having been dismissed for want of jurisdiction, the merits of the cause are not before us. Neither, for the same reason, are we concerned with the question much discussed in the briefs of both appellant and appellee, with authorities pointing both ways, whether the declaratory judgment jurisdiction is discretionary, that is, whether if the complaint makes out a case under the

[3] Borchard Declaratory Judgments, pages 187, 188, 417, 424, 426, 433, 436, 566, 606, 101 A. L. R. 694.

statute, the exercise of such jurisdiction, may in the court's discretion, be refused. The court having dismissed the cause for "lack of jurisdiction" because the court was of the opinion that "it had no jurisdiction" of it, we are concerned here with questions neither of discretion nor of the merits, but only with whether there was jurisdiction and we think it plain that there was.

The proceedings in the senate in connection with the passage of the Johnson Act, as well as the terms of the act itself, make it clear that it was designed and enacted to prevent the exercise of the injunctive jurisdiction to restrain or suspend the enforcement of orders affecting the rates of public utilities. Neither in terms nor in purpose does the act extend to cases of this kind where rates as such are not in question, and neither injunctive nor other suspensive orders are asked for, but there is merely an invocation of jurisdiction, under the declaratory judgment act, to determine and declare rights, under a contract, which must be settled and determined before either party can safely or justly proceed.

If instead of the company suing to declare the contract at an end, the city were suing to specifically enforce it, there could we think be no question of jurisdiction. There ought to be and we think there is none, when the company sues to have the same contract declared inapplicable, or at an end. This kind of jurisdiction was fully recognized and given effect in *Haworth's* Case, 300 U. S. 227; and it has been and is being given full effect since, in suits by insurance companies to determine whether or not and to what extent their contracts bind them to defend.

No reason presents itself to us why the jurisdiction does not exist fully here. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings.

Reversed and Remanded.

A True copy:
Teste:

(Seal)

Oakley F. Dodd,
Clerk of the United States Circuit
Court of Appeals for the Fifth Circuit.

APPENDIX D.

Senator Hiram Johnson, of California, introduced the so-called Johnson Amendment, and it was, as introduced, in this form:

"A BILL

"To amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to orders of State administrative boards.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: 'Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, and/or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.'

"Sec. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed."

The Senate Committee reported, May 9th, No. 701:

"We recommend that the bill be amended on page 2, line 3, by striking out the words 'and/or' and inserting, in lieu thereof, the word 'or'.

"As thus amended, we report favorably thereon and recommend the passage of the bill,"

Senator Norris saying:

"This bill has for its object the taking away of jurisdiction of Federal district courts to enjoin, suspend, or restrain the enforcement of any order of an administrative board or commission of a state or to enjoin, suspend, or restrain any action in compliance with such order, where the jurisdiction is based solely upon the ground of diversity of citizenship, or *where* jurisdiction is claimed on an alleged repugnance of such order of such board to the Constitution of the United States, and where such order affects the rates chargeable by a public utility, does not interfere with interstate commerce, and has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy is provided for by the laws of the State."

Thereupon, not having been heard at that term of the Senate, it was reintroduced as amended, Senator Norris, upon Friday, May 26, 1933, saying:

"I would like to say this is the same bill word for word, that was introduced in the last Congress, upon which hearings were held in connection with two other bills proposing to amend this same Federal statute in regard to the jurisdiction of Federal courts. * * *

"The subcommittee at that time reported this bill * * * with a favorable recommendation. This bill, together with the other bill, known as S. 937, were reported by the full committee to the Senate with a favorable recommendation. This particular bill, now known as S. 752, was recommended by the full committee for passage after striking out the words 'and/or' and inserting in lieu thereof 'or'. The bill now known as S. 752 was then known as S. 3243."

On June 6, 1933, Mr. Norris, for the Committee, made this report:

"The committee on the Judiciary, to which was referred the bill (S. 752) to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over controversies relating to orders of State administrative boards, having had the same under consideration, beg leave to make a favorable report thereon and to recommend the passage of the bill.

"This bill is practically the same as S. 3243, introduced in the Seventy-second Congress, first session. That bill, in the Seventy-second Congress, was referred to the Committee on the Judiciary, and the Committee on the Judiciary referred the same to a subcommittee. The subcommittee held unlimited hearings on the bill, both those who favored and those who opposed it were given opportunity without limit to express their views. Among those who opposed the bill was the American Bar Association. This association was represented at the hearing and made an extended argument in opposition to the bill. At the conclusion of the hearings, the sub-committee unanimously made a favorable report to the full committee. The matter was then taken up in the full committee, and, on the 18th day of May 1932, the Committee on the Judiciary ordered the bill favorably reported to the Senate. On account of the crowded condition of the Senate Calendar, the bill was never reached for Senate consideration, and died on the calendar at the expiration of that Congress.

"In the Seventy-third Congress, on the 23rd day of March 1933, the bill was again introduced in practically the same form. The Committee on the Judiciary thereupon again referred the bill to a subcommittee. The subcommittee, after due consideration, reported the bill back to the full comcommittee with a favorable recommendation. Afterward, before the full committee had acted upon this report of its subcommittee, the American Bar Association requested of the Chairman of the Committee on the Judiciary that it again be given an opportunity to be heard in opposition to

the bill, and, upon consideration of this request, the full committee again, for the third time, referred the bill back to the subcommittee, with instructions to hold further hearings. In compliance with the orders of the full committee, the sub-committee granted further hearings, and the American Bar Association, together with others, appeared in opposition to the bill. At the conclusion of the hearings a majority of the subcommittee again reported the bill back to the full committee, recommending that the bill be favorably reported to the Senate. The full committee took up the report of the subcommittee, and after a lengthy discussion the committee (a majority of the full committee voting therefor) ordered the same to be reported again to the Senate, with a favorable recommendation.

"It will thus be seen that the bill has been considered by the Committee on the Judiciary in two Congresses; it has been three times referred to and considered by the subcommittee of the Committee on the Judiciary, and at two of these times hearings were had. One cannot escape the conclusion that those who are opposing the bill are resorting to tactics that can have but one effect, and that is to delay final action by the Congress. The American Bar Association was given full opportunity to express its ideas at the first hearing. Nothing new was presented at the subsequent hearing. It was simply a rehashing of the old argument made over and over again, but by waiting until the Committee on the Judiciary was about to act, and then securing a third reference of the bill to a subcommittee, with directions to hold hearings, those opposed to the bill succeeded in delaying action until it is undoubtedly impossible to get action at the present session of Congress.

"This bill has for its object the taking away of jurisdiction of Federal district courts to enjoin, suspend, or restrain the enforcement of any order of an administrative board or commission of a State or to enjoin, suspend, or restrain any action in compliance with such order, where the jurisdiction is based solely upon the ground of diversity of citizenship or where jurisdiction is claimed on an alleged repugnance of such order of such board to the Constitution of the United States, and where such order affects the rates

chargeable by a public utility, does not interfere with interstate commerce, and has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy is provided for by the laws of the State."

It will be noted that as thus introduced and as thus heard, it did not refer to municipalities, and there was not in these considerations any reference made to municipalities, and this clause integrating municipalities was not had until the bill had passed the Senate and was about to pass the House, when on suggestion from the Congressman from Arkansas that in his state it would not be applicable in any aspect, without hearing, and without argument, this section here invoked was integrated.

The alleged evils wherefor rectification was sought are thus stated (Cong. Rec., p. 8559):

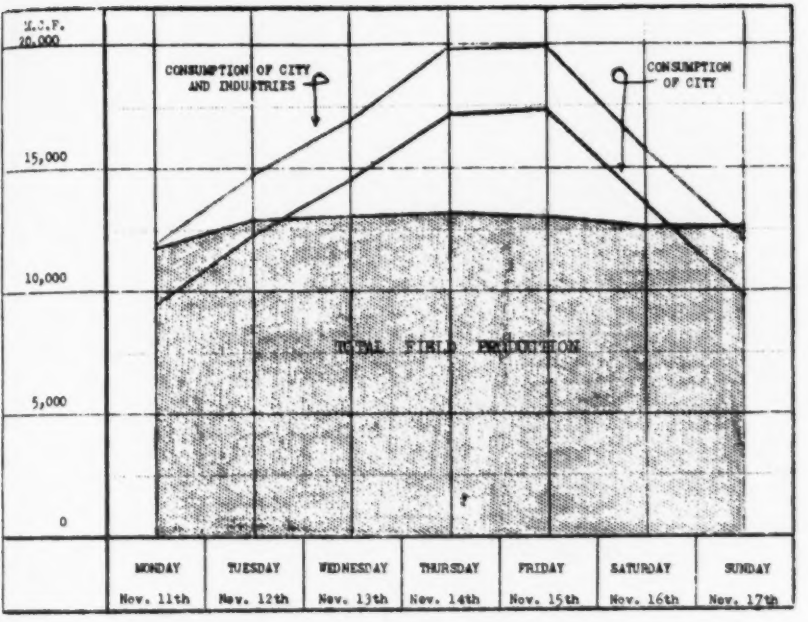
"First. Under the present practice, after a full hearing on rates has been had before the State administrative Board or commission, the utility may and sometimes has applied to the United States district court for an injunction, alleging that rates fixed by the State board or commission are confiscatory, that is to say that such rates deprive the utility of its property without due process of law in violation of the guaranties of the fourteenth amendment to the Constitution of the United States. In the Federal Judicial Code, as it now stands, there is no express provision under which, except by consent of all parties, the United States court can not consider the transcript of the proceedings before the State board or commission. Consequently, under the present practice, the evidence taken before the board or commission is generally disregarded and it is necessary to take all the evidence over again at very great expense in time and money.

"Citizens complaining of rates alleged to be excessive have sometimes been unable, because of limited funds, properly to present their case a second time in the United States court after having already presented it once fully before the board or commission, with the result, so it is claimed, that efforts to secure relief from extortionate rates have had to be abandoned. The mere threat by the utility company that it would seek an injunction in a United States court, involving

the prospect of great additional expense and delay, has sometimes been sufficient to force a compromise unfavorable to the public interest. Even if rate-payers or public regulatory bodies were supplied with sufficient funds to carry on expensive litigation, the procedure of adducing the same evidence twice—once before the board or commission and again before the United States court—is wasteful of time as well as of money. Justice delayed is justice denied.

"Second. Under the laws of every State provision is made for some sort of a review of the orders of the State regulatory board or commission in the courts of the State. In some few cases it appears that, after the hearing before the board or commission, the utility dismissed these proceedings in the courts of the State, and sought and secured an injunction in the district court of the United States. Clearly any such procedure tends to defeat the ends of justice by increasing expense and delay. Furthermore, a litigant should be bound by its election of the forum in which it shall proceed. It should not be permitted to speculate upon what may appear to be the favorable or unfavorable attitude of a tribunal. If it starts in a State court, it should be required to pursue its remedy to the highest court of the State, reserving always its right of appeal to the Supreme Court of the United States."

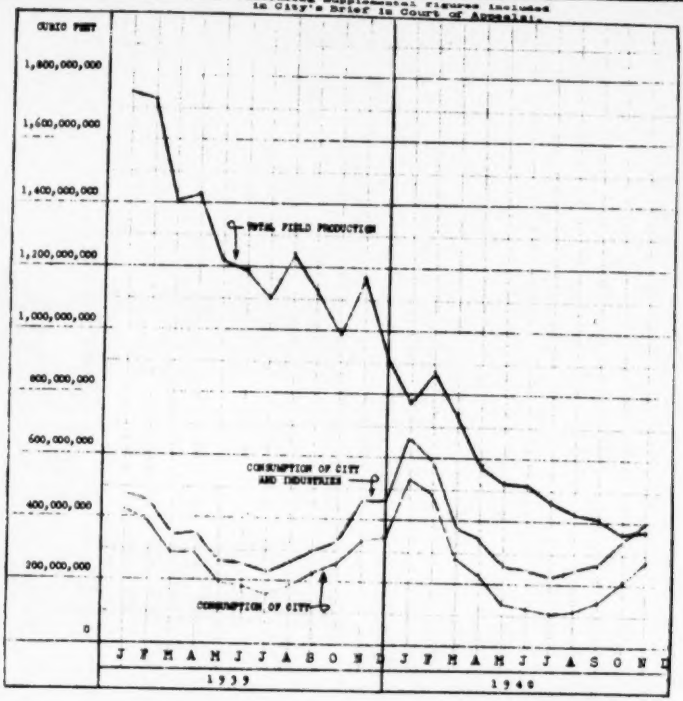
APPENDIX B-



SHOWING TYPICAL NOVEMBER 1940 WEEK

ate	TOTAL PRODUCTION Jackson Field, M.C.F.	TOTAL CONSUMPTION City of Jackson MCF	TOTAL CONSUMPTION Jackson Industries, MCF	TOTAL CONSUMPTION City of Jackson and Jackson Industries, M.C.F.
ov. 11, 1940	11,657	9,483	2,372	11,855
ov. 12, 1940	12,829	12,341	2,317	14,658
ov. 13, 1940	13,034	14,595	2,335	16,930
ov. 14, 1940	13,143	17,233	2,648	19,881
ov. 15, 1940	12,965	17,492	2,430	19,922
ov. 16, 1940	12,567	13,586	2,207	15,793
ov. 17, 1940	12,586	9,874	2,190	12,064
Total	88,781	94,604	16,499	111,103

Appendix B- (Including supplemental figures included in City's Brief in Court of Appeals.



	TOTAL PRODUCTION Jackson Field, M.C.F.	TOTAL CONSUMPTION City of Jackson MCF	TOTAL CONSUMPTION Jackson Industries, MCF	TOTAL CONSUMPTION City of Jackson and Jackson Industries, M.C.F.
Jan. 1939	1,740,012	419,570	57,743	477,313
Feb. 1939	1,725,452	390,046	61,335	451,381
Mar. 1939	1,404,209	289,506	53,683	343,189
Apr. 1939	1,423,128	284,258	69,480	353,738
May 1939	1,201,599	197,424	68,933	266,357
June 1939	1,190,496	184,997	68,479	253,476
July 1939	1,100,949	157,145	68,210	225,355
Aug. 1939	1,237,964	183,280	72,247	255,527
Sept. 1939	1,128,904	225,253	68,429	293,682
Oct. 1939	993,924	256,929	67,957	324,886
Nov. 1939	1,170,795	334,327	122,823	457,150
Dec. 1939	915,228	340,127	116,192	456,319
Jan. 1940	779,159	529,416	136,381	665,797
Feb. 1940	871,395	481,917	104,320	586,237
Mar. 1940	740,835	269,943	101,164	371,107
Apr. 1940	577,671	223,740	119,702	343,442
May 1940	524,393	137,589	118,427	256,016
June 1940	515,669	119,712	123,821	243,533
July 1940	461,970	107,390	113,367	220,757
Aug. 1940	423,951	114,645	132,095	246,740
Sept. 1940	407,524	140,806	128,456	269,262
Oct. 1940	366,468	202,191	137,054	339,245
Nov. 1940	378,131	273,131	122,974	396,105